

SEP. 1 1953

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States.No. **307** OCTOBER TERM, 1953

In the Matter

of

HAROLD SACHER, also known as "HARRY"
SACHER, and ABRAHAM J. ISSERMAN,
Attorneys.

HAROLD SACHER, also known as "HARRY"
SACHER, an Attorney,
Petitioner,

and

ASSOCIATION OF THE BAR OF THE CITY OF
NEW YORK and NEW YORK COUNTY LAWYERS'
ASSOCIATION,

Respondents,

TRANSCRIPT OF RECORD

INDEX

	PAGE
Statement Under Rule 15(b)	1
Order to Show Cause	2
Petition of Association of the Bar of the City of New York and New York County Lawyers' Association	3
Affidavit of F. W. H. Adams in Support of Foregoing Petition	5
Respondents' Answer	56
Transcript of Hearing of November 15, 1950	80
Transcript of Hearing of December 21, 1950	93
Memorandum of Decision of Hincks, U.S.D.J.	237
Appendix to Affidavit of F. W. H. Adams of January 17, 1950	272
Order of Disbarment Appealed From	274
Notice of Appeal	275

PROCEEDINGS IN U. S. COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions	276
Judgment	292
Motion to Extend Stay of Issuance of Mandate	294
Indorsement Denying Motion	297
Order Denying Motion	298
Petition for Rehearing	300
Opinions on Petition for Rehearing	321
Order Denying Petition for Rehearing	323
Clerk's Certificate	325

United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matter

of

HAROLD SACHER, also known as "HARRY" SACHER,
and ABRAHAM J. ISSERMAN,

Attorneys.

Statement Under Rule 15(b)

The above-entitled proceeding, which was brought to disbar the above-named attorneys from the Bar of the United States District Court for the Southern District of New York, was commenced on or about the 14th day of April, 1950.

The petitioners in the above-entitled proceeding are the Association of the Bar of the City of New York and the New York County Lawyers' Association.

The respondents in said proceeding are Harold Sacher, also known as "Harry" Sacher, and Abraham J. Isserman.

The petition herein was filed in the office of the Clerk of the United States District Court for the Southern District of New York on the 14th day of April, 1950.

The respondents' answer was filed in the office of the Clerk of the United States District Court for the Southern District of New York on the 16th day of October, 1950.

The trial was had on the 21st day of December, 1950, and the Judge hearing the same was Honorable Carroll C. Hincks. No question was referred to a commissioner, master or referee.

The final decrees herein were entered on the 11th day of January, 1952. The appeal of respondent Sacher was taken on the 12th day of January, 1952.

Order to Show Cause

Upon reading the annexed petition of Robert P. Patterson, as President and on behalf of the Association of the Bar of the City of New York, and of I. Howard Lehman, as President and on behalf of the New York County Lawyers' Association, it is

ORDERED,

That Harold Sacher, also known as "Harry" Sacher, and Abraham J. Isserman, are directed to appear at a term of the United States District Court to be held in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, at 10:30 o'clock in the forenoon of the 23rd day of May, 1950, or as soon thereafter as counsel can be heard, and show cause why each of them should not be disbarred from practice as attorneys of this Court, or why such other disciplinary measures as the Court might deem just and proper should not be taken with respect to them.

Service of this order and the petition and affidavit annexed thereto upon Harold Sacher, also known as "Harry" Sacher, either personally or by depositing a copy thereof securely enclosed in a post-paid wrapper in the Post Office of the United States of the City of New York, directed to said Harold Sacher, also known as "Harry" Sacher, at Room 1604, 401 Broadway, New York 13, N. Y., on or before April 18th, 1950, and upon Abraham J. Isserman either personally or by depositing one copy thereof securely enclosed in a post-paid wrapper in the Post Office of the United States of the City of New York, directed to said Abraham J. Isserman at Room 1604, 401 Broadway, New York 13, N. Y., on or before April 18th, 1950, shall be sufficient service thereof.

***Petition of Association of the Bar of the City of New York
and New York County Lawyers' Association***

Said Harold Sacher, also known as "Harry" Sacher, and said Abraham J. Isserman, shall serve copies of their answering affidavits or other papers, if any, which they intend to submit to this Court in opposition to this application, upon F. W. H. Adams, 49 Wall Street, New York 5, New York, on or before the 12th day of May, 1950.

(Signed) HENRY W. GODDARD,
*Judge of the United States District
Court for the Southern District of
New York.*

Dated: New York, N. Y.
April 14, 1950.

***Petition of Association of the Bar of the City of New
York and New York County Lawyers' Association***

*To the Honorable, John C. Knox, Chief Judge, United
States District Court, Southern District of New York:*

ROBERT P. PATTERSON, as President and on behalf of the Association of the Bar of the City of New York, and I. HOWARD LEHMAN, as President and on behalf of the New York County Lawyers' Association, hereby petition this Court to inquire into the conduct of Harold Sacher, also known as "Harry" Sacher, an attorney at law, admitted to practice in the Courts of the State of New York and in the United States District Court for the Southern District of New York; and into the conduct of Abraham J. Isserman, an attorney at law admitted to practice in the United States District Court for the Southern District of New York; and to make the orders and determinations prayed for in the prayer of this petition.

*Petition of Association of the Bar of the City of New York
and New York County Lawyers' Association*

As a basis for making this inquiry and for the making of such orders and determinations, the petitioners present the affidavit of F. W. H. Adams, sworn to the 17th day of January, 1950, setting forth the facts pertaining to the conduct of the respondents herein.

W H E R E F O R E,

Petitioners pray that the Chief Judge of this Honorable Court receive their petition and the annexed affidavit; issue as regards said Harold Sacher, also known as "Harry" Sacher, and said Abraham J. Isserman an appropriate order to show cause and such other process as may be appropriate; hear the proofs in this matter and decree that said Harold Sacher, also known as "Harry" Sacher, and Abraham J. Isserman be disbarred from practice as attorneys before this Court, or that such disciplinary measures be enforced as to said Harold Sacher, also known as "Harry" Sacher, and Abraham J. Isserman as to this Court may seem just.

ROBERT P. PATTERSON,
As President and on behalf
of the Association of the
Bar of City of New York.

I. HOWARD LEHMAN,
As President and on behalf
of the New York County
Lawyers' Association.

Petitioners

Dated: New York, N. Y.
January 17, 1950.

F. W. H. ADAMS,
Attorney for Petitioners,
49 Wall St.,
New York 5, N. Y.

Affidavit of F. W. H. Adams in Support of Foregoing Petition

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

F. W. H. ADAMS, being duly sworn, deposes and says:

1. I am a member of the Bar of the State of New York and of this Court.

2. I have been designated by the Association of the Bar of the City of New York and the New York County Lawyers' Association to investigate the conduct of Harold Sacher, also known as "Harry" Sacher, and Abraham J. Isserman, attorneys, and to conduct disciplinary proceedings against said attorneys on behalf of said associations.

3. Harold Sacher, also known as "Harry" Sacher (herein referred to as Sacher), took the oath and was admitted to practice as an attorney by this Court on January 15, 1932, and has at all times since that date continued as an attorney at law admitted to practice in this Court.

4. Abraham J. Isserman (herein referred to as Isserman), took the oath and was admitted to practice as an attorney by this Court on July 28, 1936, and has at all times since that date continued as an attorney at law admitted to practice in this Court.

5. On July 20, 1948, indictment was filed in this Court against W. Z. Foster, E. Dennis, J. B. Williamson, J. Stachel, R. G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John W. Gates, Irving Potash, G. Green, C. Winter and G. Hall, charging a conspiracy both to organize as the Communist party a group who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and to teach and advocate the necessity of overthrowing and destroying the Gov-

***Affidavit of F. W. H. Adams in Support of Foregoing
Petition***

ernment by force and violence, in violation of Title 18, Section 10, U. S. Code, and Title 18, Sections 11 and 13, U. S. Code, commonly known as the Smith Act.

6. Thereafter, on September 20, 1948, Sacher appeared in said case on behalf of the defendant, John W. Gates; on January 17, 1949 on behalf of the defendants, Benjamin J. Dennis, Jr. and Irving Potash; and on August 9, 1949 as co-counsel on behalf of the defendant, Henry Winston.

7. On October 15, 1948, Isserman appeared in said case on behalf of the defendant, John B. Williamson, and on January 17, 1949 on behalf of the defendant, Gilbert Green.

8. The other defendants were represented by Richard Gladstein, George W. Crockett, Jr., and Louis F. McCabe. These attorneys are not admitted to practice in the Southern District of New York and were permitted to appear in this case by courtesy. After March 17, 1949, the defendant, Dennis, acted as his own attorney.

9. The indictment in said case was brought on for trial before the Honorable Harold R. Medina, a Judge of this Court, on January 17, 1949. At that time the respondents, acting with counsel for the other defendants, filed a challenge to the panel and array of the jurors in this Court. Proceedings in connection with said challenge continued until March 4, 1949, when said challenge was overruled.

10. The Findings of Fact and Conclusions of Law filed by the Court in connection with overruling the challenge contain the following finding:

"Trial counsel for the defendants have participated in a wilful, deliberate and concerted effort to delay the trial of the charges of the indictment by making the challenge to the jury lists and by in-

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

cluding in the challenge extravagant charges of discrimination against a multitude of minority groups, which they must have known were unfounded. In the lengthy trial of the jury challenge they, acting in concert, wilfully engaged in grossly improper tactics for the purpose of obtaining further delay and for the purpose of bringing the administration of justice in this court into disrepute."

11. The trial of the defendants on said indictment before Honorable Harold R. Medina, and a jury, commenced on March 7, 1949, and was concluded by a verdict of guilty as to all defendants on October 14, 1949. Sentence was imposed on October 21, 1949. The respondents actively participated in all the proceedings before the Court in collaboration with counsel for the other defendants.

12. The trial of the indictment and the proceedings in connection therewith involved a grave charge against the defendants and were, and continue to be, a matter of public importance. There was great public interest in all of the proceedings before the Court throughout the entire country and the proceedings resulted in widespread publicity.

13. A stenographic transcript of the minutes of the proceedings on the challenge and on the trial has been filed in this Court together with the other papers relating to this case and I have examined copies of the same. References hereafter made to the proceedings on the challenge will be designated "Ch. Tr." and references to the transcript of the proceedings at the trial will be designated "Tr."

14. During the entire proceedings and trial Sacher and Isserman and Messrs. Gladstein, Crockett, McCabe, and after March 17, 1949, the defendant, Dennis *pro se*, joined

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

in a wilful, deliberate and concerted effort to delay and obstruct the trial and proceedings, for the purpose of causing such disorder and confusion as would prevent a verdict by a jury on the issues raised by the indictment; and for the purpose of bringing the Court and the entire Federal judicial system into general discredit and disrepute, by endeavoring to divert the attention of the Court and jury from the serious charge against their clients of a conspiracy in substance to teach and advocate the overthrow of the Government of the United States by force and violence, by making unfounded and unjustifiable attacks on the Presiding Judge, and all the Judges of this Court, the Jury system in this District and by other wrongful and unjustifiable conduct.

The entire record, which is hereby referred to, shows that to effect this plan, the respondents, and the other counsel, without justification, conducted themselves in the manner set forth below. Citations are made to the record, indicating some but not all instances of the conduct referred to.

a. Disregarded numerous warnings of the Court concerning their wilful delaying tactics, except for ironical references thereto;

<i>Ch. Tr.*</i>	<i>Ch. Tr.</i>	<i>Tr.</i>
1526	3345-46	27-28
1777-80	3415	134-135
2546	3947	2350-51
2839	4099	5260-65
2842	4286	5826-33
3173-74	4401	6037
3290-91		

* See pp. 272-273 where these references to the stenographic transcript are converted to corresponding references to the Volume and page of the printed record in the *Dennis* case (Petitioner's Exh. A) which was prepared after the date of this affidavit.

***Affidavit of F. W. H. Adams in Support of Foregoing
Petition***

b. Suggested that various findings by the Court were made for the purpose of newspaper headlines;

<i>Ch. Tr.</i>	<i>Ch. Tr.</i>	<i>Tr.</i>
2548-54		4116-17 6980

c. Insinuated that there was connivance between the Court and the United States Attorney;

Ch. Tr.

3420
2463
2302

d. Insisted on objecting one after another to rulings of the Court, despite a ruling on the first day of the trial, repeated several times thereafter, that all objections and exceptions would inure to the benefit of each of their clients unless disclaimed;

<i>Ch. Tr.</i>	<i>Tr.</i>
847-48	5-7
2420	454-59
2621-24	697
3163-67	1044
3256-57	1359
3289	2699
	3248
	5261
	11269-76

e. Persisted in making long, repetitious, and unsubstantial arguments, objections, and protests,

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

working in shifts, accompanied by shouting, sneering and snickering;

<i>Ch. Tr.</i>	<i>Tr.</i>	<i>Tr.</i>	<i>Tr.</i>
1380-1390	406-407	1602-1604	3320-3326
1780	412	1909-1912	3433-3434
2544-2554	424-427	1952-1956	3649-3650
2623-2632	1304-1337	2014-2021	3928-3940
2683-2684	1358	2041-2106	5808
2694-2695	1372-1374	2658-2661	6571-6580
3174-3178	1505-1510	3034-3036	7123
3417-3436	1573-1576	3194-3195	11031
4397-4404	1583-1586	3255-3261	11070-73
			11269-74

f. Urged one another on to badger the Court;

Ch. Tr.

3175-3176

g. Repeatedly made charges against the Court of bias, prejudice, corruption and partiality;

<i>Ch. Tr.</i>	<i>Tr.</i>	<i>Tr.</i>	<i>Tr.</i>
1236	4-4a		10726-7
1390	842	6046-50	10981-83
2302	1301-2	6054	11070-73
2463-67	2665-6	6286	11269-81
2493-2500	3508	6838	11818-9
2551-4	3511	7374	13893-4
3270	3680	7649-7650	14219-24
3420-35	5108-9	7941	
4116-24			15293
4560-62			
4590			
4817			

*Affidavit of P. W. H. Adams in Support of Foregoing
Petition*

h. Made a succession of disrespectful, insolent, and sarcastic comments and remarks to the Court;

<i>Ch. Tr.</i>	<i>Ch. Tr.</i>	<i>Tr.</i>
1390	3270	142
2302	3420-35	662
2463-7	3674	785
2469	3675	842
2493-2500	4100	14223
2621-2632	4101	
2973	4560-2	
3105	4590-4591	
3176	4663-64	
	4781-4782	

i. Disregarded repeatedly and flagrantly the orders of the Court not to argue without permission and to desist from further argument or comment;

<i>Ch. Tr.</i>	<i>Tr.</i>	<i>Tr.</i>	<i>Tr.</i>
2483-2500	94-97a	3753	10381-82
2541-42	103-106	4037	10428-30
2544-46	753-54	4241-43	10785
2548-54	759-63	4715	11031-32
2621-32	2090-91	6460-62	11070-73
2683-85	2336-37	6532	11228-29
3106	2340-41	6838	11269-81
3287-88	2342	6961	11434-35
4400	2346-47	6970-71	11610-11
4559-62	2364-69	7060-62	11818-19
4701-02	2479-80	7123-24	12084
	2813-14	7311	12725
	2818-20	7330-32	12822-23

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

3034-36	7892-92a	13169
3158-59	8237-38	13334-38
3305	8266	13425
3309	9146-47	13483
3387-88a	9597-99	13519
3398-99	10244-45	13712
3437	10264	13893-9
3664	10335-36	14758

j. Disregarded rulings on the admissibility of evidence so as to endeavor to place before the jury by leading questions the subject matter excluded;

<i>Ch. Tr.</i>	<i>Tr.</i>	<i>Tr.</i>
2494-95	2294-97	6271-72
3034	2300	7486
4498-4501	2439	9875
4538-43	3131	11185-86
	3194	12536-40
	3366	13484-85
	3765-67	13530
	4148-49	13577
	4588-89	13956-58

k. Persisted in asking questions on excluded subject matters, knowing that objections would be sustained, to endeavor to create a false picture of bias and partiality on the part of the Court;

<i>Ch. Tr.</i>	<i>Tr.</i>	<i>Tr.</i>
2694	8281-8301	12851-53
2742	11247-50	13163-65
4498-4501	12132-34	13981-84
4538-43	12260-66	14653-63
	12536-40	

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

l. Accused the Court of racial prejudice without
any foundation;

Ch. Tr.

Tr.

4400-01

15293-94

See also *Tr.* 11410

12891-93

m. Generally conducted themselves in a most
provocative manner in an endeavor to call forth
some intemperate or undignified response from the
Court which could then be relied upon as a demon-
stration of the Court's unfitness to preside over the
trial;

<i>Ch. Tr.</i>	<i>Tr.</i>	<i>Tr.</i>	<i>Tr.</i>
1292-96	22	6907-08	11070-73
1355-65	1165-68	6927	11269-81
1777	1171-73	6973-87	12354-55
1783	1877-79	6977	12566-70
2463-67	2432	7272-76	12616
2493-2500	2479-80	7363-64	12809
2548-54	2750-51	8270	13119-21
2993-95	3649-50	8708-09	13124-25
3379	3678-79	8895	13169
3399	3928-32	9632-34	13346
3420-36	3936-40	9691-92	13508-09
3599-3600	4400-01	10038-40	13512-13
3870-72	5310-12	10061-65	13519
3925-26	5440-46	10253-58	13717
4107-08	5460-61	10264-66	13893-94
	5725	10335-36	14125
	6046-50	10339	14219-24
	6054-58	10499-10501	14240-41
	6271-72	10672	14326
	6532	10698-10700	14913-14
	6838	10765-66	14928
	6885-86	10788-92	15039
			15208-09

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

15. The record further discloses the following conduct
by Sacher:

I. On January 3, 1949, in the course of arguing a routine motion for a physical examination of the defendant, Foster, before the Honorable Sylvester Ryan, a Judge of this Court, the following occurred:

"Mr. Sacher: But, your Honor, you see you come to the conclusion it is a routine motion on the basis of an unfamiliarity with the case, which you say you have. If it is routine it will entail no great burden on Judge Medina. The point we want to make here is this: We want to be in a position where we at all times are given the fullest constitutional opportunity to defend the rights and interests of our clients.

The Court: You don't have to be put in that position. You are in that position.

Mr. Sacher: We are not. We are not to get the opportunity—

The Court: I don't want any more statements from you. I think your statement is contemptuous. The minute you enter this door you are given full opportunity to defend anybody you are here to defend.

Mr. Sacher: Yet when the District Attorney says that he said—

The Court: I don't want any more statements like that made in my presence.

Mr. Sacher: I wish to except to your Honor's statement.

The Court: You can except but I want that matter dropped at this time."

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

II. On January 21, 1949, during the hearing on defendants' challenge to the jury system, Herbert Allen, a member of the petit jury panel for the January Term of Court, was called as the first witness in support of the challenge. During his direct examination by Mr. Gladstein, Mr. Allen was asked for the assessed valuation of his home to which question an objection was sustained. Thereafter, lengthy argument was directed to the Court by Messrs. Gladstein, McCabe, Isserman and Sacher, which was brought to a conclusion with Sacher shouting at the Court (Ch. Tr. 1390):

"Well, let me make the thing clear: your Honor said that you were going to conduct a hearing, and I tell you now if what you are going to do is to prevent us from asking these questions and proving the fact, then this hearing is no hearing; it is just a sham and a pretense designed to prevent the establishment of those facts which will prove that the system is precisely what we say it is."

III. On January 27, 1949, after the Court had indicated its belief that defense counsel were engaged in a deliberate, wilful and concerted effort to obtain delay, Sacher addressed the Court by shouting as follows (Ch. Tr. 1780-81):

"Mr. Sacher: I want to state on the record, however, that I deny what your Honor said.

The Court: You don't need to shout, Mr. Sacher.

Mr. Sacher: No. I resent—

The Court: It is possible to address the Court occasionally without shouting.

Mr. Sacher: Yes. Your Honor in a quiet manner is picking out a point which will result in certain headlines tomorrow morning. For the record I want

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

to make it clear that I have done nothing and will never do anything to delay or hinder the progress of this case. And whatever I or any other counsel in this case have done or has done has been directed solely to the achievement of the end of proving that this jury system is bad.

And I think, your Honor, that there is no justification for closing every day's session with the observation as to what thought was entering your Honor's mind concerning our state of mind."

IV. On February 3, 1949, after hearing lengthy argument by Mr. Gladstein (Ch. Tr. 2483-2489), the Court sustained a Government objection to certain evidence proffered through the witness, Wilkerson. After a recess granted at Sacher's request, Mr. Crockett and Sacher argued for a reconsideration of the ruling (Ch. Tr. 2490-2501). Continuing the attack of defense counsel upon the Court and completely ignoring the fact that the Court had heard Mr. Gladstein at length before ruling, Sacher loudly complained (Ch. Tr. 2494):

"I repeat, this is an Alice in Wonderland procedure. We always get the sentence first and then the trial. Now if we could just get back to ordinary procedure with the trial first and sentence afterwards, this might be a little more real—"

The Court directed Sacher to "completely refrain from further argument along this line" (Ch. Tr. 2494). Notwithstanding the direction of the Court, Sacher shortly returned to his attack upon the Court, as follows (Ch. Tr. 2500):

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

"Is it because the evidence is becoming too devastating for the Government that we must now be circumscribed? This is the telling stuff. Why are we stopped at this point when we proceed definitely to show that the Republican Party vote is the guide to the determination of how many jurors come from a district, and not that impartial selection which the Constitution and the statute require? That is what is at stake in this instance, your Honor, and I submit I don't want to take any more of your time if we are doing nothing to influence you; I don't want to be like the Yankee in King Arthur's Court—"

V. On February 4, 1949, during the challenge to the jury system and in the course of the direct examination of the witness, Marcantonio, by Isserman, the witness was asked to state how long certain low-rent housing projects had been in existence. The Court sustained an objection and told Isserman that it did not wish to hear argument from him. However, Isserman proceeded to argue and he was joined by Sacher and other counsel. Repeatedly, the Court interrupted counsel stating that it did not desire to hear argument. Nevertheless, counsel continued (Ch. Tr. 2544-2548). The Court then directed counsel to proceed with the interrogation of the witness (Ch. Tr. 2548).

Thereafter Sacher commenced speaking and the Court stated twice that it did not desire to hear him at that time (Ch. Tr. 2549). Despite this Sacher continued (Ch. Tr. 2549-2550) as follows:

"But you have characterized my conduct as well as that of trial counsel, and I wish to deny it on the record, and I wish to say that your Honor is aware of the fact that there are 40 or 50 newspapers here, and on the threshold of Congressman Marcantonio's office—"

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

tonio's testimony you have taken occasion to say that his testimony is being introduced for the purpose of dragging and delaying the trial; and I say—

The Court: Did I say that?

Mr. Sacher: Well, you imply that very broadly. If your Honor wishes to deny it I shall be glad to have the denial. But I got the impression very distinctly that your Honor's observation was made just on the threshold of the Congressman's testimony and that it was designed to color the effect and impression to be given to it, and I do not believe, your Honor, that that is appropriate.

The Court: If you are only trying to provoke me, Mr. Sacher, you are wasting your time."

VI. On February 4, 1949, while the witness Marcantonio was still being examined by Isserman, the witness was asked if he had found many persons residing in his Congressional District who were known to him to be of average intelligence. The Court sustained an objection. However, Isserman proceeded to argue the matter. Finally, the Court sought to close argument, directing Isserman to take his exception (Ch. Tr. 2621). Nevertheless, Isserman persisted (Ch. Tr. 2621-2622) as follows:

"Mr. Isserman: I was in the middle of my objection when your Honor interrupted to misconstrue a statement that I made. I said, conditionally—

The Court: I wish you would not say that I do that, to misconstrue.

Mr. Isserman: It seems to me to have been misconstrued.

The Court: That seems an impertinent thing. Mr. Isserman, that seems an impertinent thing. You

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

are an experienced lawyer and you know better than to do that.

Now, you lawyers have been at that here for three weeks, perhaps to provoke me—I don't know what the reason may be. But I do know that if you keep it up some day, perhaps now, perhaps hereafter there will be a time of reckoning. Now, please don't do that.

Mr. Isserman: And I would like now to object to your Honor's characterization of my comment.

Now, the statement that I was making—

The Court: Well, when you charge me with deliberately misconstruing something I regard that as impertinence.

Mr. Isserman: I did not say it was deliberate, your Honor. But I said it seemed to me to be that. But, in any event, what I was saying was this: I said if this were a small community the method of proof, as indicated by the cases would be to call the persons directly involved. Your Honor has thus far conditionally ruled that your Honor would not allow the calling of those persons who would give the direct evidence on their status."

Isserman continued his argument and the Court again interrupted to remind Isserman of the Court's previous direction as follows (Ch. Tr. 2623-2624):

"The Court: Now, Mr. Isserman—

Mr. Isserman: Now, the reason why—

The Court: Let me say something to you. In every judicial proceeding that I am familiar with, and I have had a pretty large experience at the bar, when the Court indicated that it didn't want any more argument on a point the lawyer quietly de-

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

sisted. If he chose to except he noted his exception and went on to something else. Here, perhaps in an endeavor to wear me out, which it is gradually doing, you keep that up, and you make the argument or arguments just as you are doing now. And I say, as I have said before, that that in my judgment is not the proper conduct of an attorney. It is extremely wearing on the Court in a trial of this kind. I suppose it will wind up by bringing me down. I hope it won't. I may have the strength to go on, and I hope I shall. But I tell you—stop it.

Mr. Isserman: I would like to take exception to your Honor's remark as an improper characterization of my conduct.

I would like to state my—complete my objection for the record if I may.

The Court: You insist on going ahead again, and all I can do, as I do not intend to make a rumpus about it, is to advise you again—please desist; and then, if you insist upon going on, why you must take the consequences, whatever they may be.

Mr. Isserman: May I state my objection for the record?

The Court: You may not."

Instead of proceeding with the interrogation of the witness, Sacher and other counsel carried on the argument. The Court told Mr. McCabe that argument was unnecessary (Ch. Tr. 2625), and then Sacher, angrily shouting, continued the argument in the guise of "observations" to the Court (Ch. Tr. 2626-2627).

VII. On February 11, 1949, in the course of the cross-examination of the witness, Wilkerson, Sacher moved to

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

strike out a remark of Mr. McGohey, the United States Attorney (Ch. Tr. 3269), who also moved to strike out a remark of Sacher's. Sacher thereupon said (Ch. Tr. 3270):

"Let's see whether I get equal treatment with Mr. McGohey."

VIII. The jury challenge commenced on January 17, 1949. On February 11th the Court determined that counsel for the defendants had taken almost four weeks to put in evidence which could have been adduced in no more than three or four days (Ch. Tr. 3291) and accordingly the Court concluded that defense counsel had engaged in a "deliberate effort here to make a mockery of justice" (Ch. Tr. 3290). At the close of court on that day, the Court directed counsel to submit a statement showing what they proposed to prove in the remainder of the challenge and how they proposed to prove it (Ch. Tr. 3344-3345). The statement was submitted on February 14th (Ch. Tr. 3346) and was found insufficient (Ch. Tr. 3415). At this juncture, the Court in the exercise of its discretion as to the order of proof, refused to hear further testimony at that time on behalf of defendants in connection with their challenge to the jury system, and directed that the Government proceed with its proof. Counsel for defendants vociferously objected and, in the course of argument, Sacher, in an insolent manner, said (Ch. Tr. 3420):

"Now, I must in all candor say, your Honor, that it is very difficult for us among the defense counsel to believe that the United States Attorney was caught unawares in the request or the direction which the Court made to him to proceed with his proof on an hour and a half's notice—"

***Affidavit of F. W. H. Adams in Support of Foregoing
Petition***

IX. On March 1, 1949, in the course of the cross-examination of the witness John Whittier Darr, Jr., the witness was asked by Government counsel how long he had been a member of American Youth for Democracy. Mr. Gladstein objected to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, but Mr. Gladstein continued to argue (Ch. Tr. 4781).

As soon as Mr. Gladstein finished, Sacher and Isserman interjected sarcastic comments, as follows (Ch. Tr. 4781):

"Mr. Sacher: May I respectfully say to your Honor that membership in the American Youth for Democracy has no more bearing on the credibility of this witness than the fact that Judge Knox is director of two of the biggest corporations in this country.

Mr. Isserman: Or, that your Honor is in the Social Register."

X. On March 7, 1949, after the Court had heard argument on a motion that counsel for the defense be permitted to conduct the *voir dire* of the jurors (Tr. 140), the following transpired (Tr. 148-9):

"Mr. Sacher: * * * After all is said and done, to whom did it matter whether Daugherty, Fall of the Tea Pot Dome scandal, or Lustig with the \$2,000,000 or more that he took from the Government—

The Court: I do not desire to hear further argument about it.

Mr. Sacher: Well, I do not know why your Honor stopped me just after I mentioned Daugherty and Lustig.

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

The Court: No, it had nothing to do with that.

Mr. Sacher: Well, if it has nothing to do with that—

The Court: But I have told you that I have determined the matter. Now your going on talking for another half hour or so isn't going to affect it at all. I feel that I have taken everything into consideration that deserves consideration, and that I am going to exercise my discretion in the way that I said I would, so I do not want any further argument on it.

Mr. Sacher: May I, however—

The Court: You will postpone further argument on everything else and we will call the jurors in now.

Mr. Sacher: I wish only to place one observation on the record, your Honor, in the light of your attitude this afternoon, in the light of your repeated announcement of predeterminations in advance even of the making of motions and the hearing and consideration of evidence, I enter upon this trial with the greatest and profoundest of misgivings for the rights of my client—my clients, rather, and I urge upon your Honor that whatever has heretofore been done by your Honor has ceased, and that at least from here on out these defendants get a fair public trial, and that all of their rights be sedulously respected, not the least of which is that they be afforded the right of representation by counsel, and I want to take exception on the ground that you have violated another of the constitutional rights of these defendants by denying them through your conduct, the assistance of counsel which the Constitution gives them."

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

XI. On March 16, 1949, after a long controversy as to the taking of a paper by defense counsel, in which up to that time Sacher had taken no part, and while Mr. McGohey was making a statement to the Court, Sacher, without leave, interrupted Mr. McGohey, and the following transpired (Tr. 842-4):

"Mr. McGohey: May I please be permitted to finish my statement?

The Court: Yes. Mr. Sacher, please do not interrupt.

Mr. Sacher: Does Mr. McGohey have these prerogatives of making long arguments? You will hear argument from nobody except Mr. McGohey on what appears to be a triviality.

The Court: Mr. Sacher, please don't be offensive. When one lawyer arises to interrupt another it is something I do not like to see, and then when I suggest that you do not do it and you make another one of these comments, the plain import of which is that I give one treatment to the prosecution and a different treatment to the defense, I consider that offensive and not respectful to the Court, and so I ask you, please don't do that again. You may except to anything that I do. You may object to my conduct in any way, but these insinuations which attack my honor and my integrity are distasteful to me, are quite unnecessary and I wish you would please stop it.

Mr. Sacher: May I renounce any intention to attack the Court's honor or the Court's integrity.

The Court: Well, your language is singularly ill-chosen, then.

Mr. Sacher: Well, I notice that your Honor has enumerated two things: you said I may object

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

and I may except, and I simply request of the Court the information as to whether that same rule will apply to the prosecution attorneys or whether they, in addition to those two things, may have extended argument and we be denied argument?

The Court: Well, it has happened too often, not only by one or another but many of defense counsel, these sly insinuations that I am giving one kind of treatment to the prosecution and a different kind of treatment to the defense, and that I am doing that in some sort of persistent fashion. I consider that a direct affront to my honor and integrity, and it is not to be tolerated that lawyers at the bar speak that way to the Court, particularly when there is absolutely no foundation for it.

Now I listen to argument when I think argument will help me, and when I feel that it will not then I ask lawyers to please not do it. I have done that on both sides. Naturally I have done it more often where the offense has been more frequent and where the occasion for the comment has been more frequent, but I can assure you that I have no idea at any time in this case of giving any different treatment or any different consideration to counsel for the defense than I do counsel for the Government.

Mr. Sacher: Well, I am happy to have that assurance from the Court."

XII. On March 24, 1949, in the course of the direct examination of the witness, Budenz, the Government, by Mr. Gordon, offered in evidence a pamphlet entitled "The Path to Peace, Progress and Prosperity." Sacher, without any further foundation therefor, then made the following statements (Tr. 1583-5):

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

"Mr. Gordon: I offer it in evidence.

(Mr. Gordon hands to Mr. Sacher.)

Mr. Gordon: I note that Mr. Sacher has a copy—

Mr. Sacher: Just a minute.

Mr. Gordon: —has a copy of that exact exhibit on the table in front of him.

Mr. Sacher: Now if your Honor please, you will observe that I have to build things around here so that counsel for the Government won't observe so much as to what is transpiring on my desk. Now this is an acknowledgment by him that we are under sort of surveillance. Now may we not have the freedom to have things on our desk and to read them without having publication given to what we have on our desk and what we are reading?

The Court: Mr. Sacher, I have been watching too, and it has seemed to me possibly that a paper might be offered and time be taken solemnly to hand it from one to another of counsel and look it over and turn it over when all the time you had your own copy right there and knew all about it.

Mr. Sacher: If your Honor please, you will observe—

The Court: It seems to me it may be, if that is so, we could save a little time by having you just glance at the paper and make your objection and be done with it.

Mr. Sacher: I would like to make this observation: You will observe that in regard to Exhibit 8, the prosecution offered two pages of it. Now it therefore becomes necessary to see what those two pages are and what the contents are, and the same goes

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

for any document, and besides we don't have dozens of them—

The Court: You can take all the time you want.

Mr. Sacher: What is that?

The Court: You may take all the time you want to examine it.

Mr. Sacher: If your Honor please—

The Court: You are not going to create any issue here.

Mr. Sacher: This thing was created solely as a result of surveillance by Mr. Gordon and his observations; and I suggest that there ought to be an end to it. We ought to have the freedom to prepare our case and present it without surveillance from the prosecution.

The Court: You are having no surveillance. There is no use trying to raise a rumpus here.

Mr. Isserman: If the Court please—

The Court: Just go about looking at the paper and make your objection and stop this nonsense."

XIII. On March 25, 1949, in the course of a discussion of the testimony of the witness, Budenz, the following took place (Tr. 1731-2):

"Mr. Sacher: Except I would like to point out, your Honor, that the exhibit, 13-A, shows that on June 2nd, which is what appears on the thing you read from; which was 16 to 18 days prior to this testimony of this witness, Mr. Foster voted for this very resolution which contained the words which your Honor read, namely, to hasten the defeat of militarist Japan, and to maintain the war effort of the Communist Party in support of such defeat, and to maintain the no strike policy, etc.

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

The Court: You see, he might well have done that and at the same time been doing these other things too.

Mr. Sacher: Also this witness might be lying.

Mr. McGohey: I move to strike that out, your Honor.

Mr. Gordon: He might not be, your Honor.

The Court: If you have any idea that that sort of comment helps the defense, I think you are making a mistake. The other day I read the minutes and I was surprised to find that Mr. Gates had made a statement that I had not heard at the time or I should have taken some action. He called somebody a liar. Now, those things in the courtroom are unseemly and they cannot possibly help the cause of those who make them. So I hope you will try to refrain from that sort of thing. You will have your opportunity in summation to comment on the credibility of the witnesses, and I think you must know that it is wholly improper for lawyers to say things like that during the progress of the trial.

You may go ahead, Mr. Gordon."

XIV. On April 5, 1949, during the cross-examination of the witness, Louis F. Budenz, the following transpired (Tr. 2479-2480):

"Q. Can't you say certainly whether it was in August or not?

Mr. McGohey: I object.

The Court: Overruled.

It is puzzling me as to what difference it made as to what date he made the speech but—

Mr. Sacher: When this witness undertakes—

The Court: Please don't argue. I allow the question.

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

Mr. Sacher: When your Honor makes a provocative remark and your Honor says you don't know what difference it makes—

The Court: I strike out your remark about my making a provocative remark. I did not make a provocative remark and I consider your response insolent. Now you please stop that. I am not in the habit of making provocative remarks. I am trying to do my best to administer justice.

Mr. Sacher: And I am trying to defend my clients.

The Court: I will not have insolence from the bar.

Mr. Sacher: I am trying to do my best to defend my clients.

The Court: You please refrain from further comment and frame your next question. I am used to having respect from the bar.

Mr. Sacher: I wish to say to your Honor that I don't want to show you any disrespect.

The Court: You reframe your question.

Mr. Sacher: And you know it.

The Court: Oh, yes, I know it. I sure do.

Mr. Sacher: And I think it is a reciprocal objection. I think lawyers who are defending their clients for their liberty should not be treated as though they were dogs in the courtroom either.

The Court: That is an insolent remark and I strike it out, the statement that you have been treated like a dog. I don't see how you dare speak that way.

If you can control yourself, please ask the next question.

Mr. Sacher: I am trying, your Honor."

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

XV. During a session of the Court on April 7, 1949, while a Government witness was under direct examination, Government counsel invited the Court's attention to the fact that a Mr. Simon Gerson, who regularly had been seated at defense counsel's table, was circulating certain papers to representatives of the press in the courtroom, whereupon the following colloquy took place (Tr. 2750-2751):

"Mr. Gordon: I see Mr. Gerson passing out some papers to the press section, your Honor.

Mr. Sacher: Now, that is absolutely wrong, your Honor. I asked Mr. Gerson to be good enough to speak to someone for me. This is another instance of surveillance.

The Court: Well, if Mr. Gerson is passing out press releases in the courtroom, please stop it.

Mr. Sacher: Well, there are no press releases.

The Court: All right. Then that settles it, that is the end of it.

Mr. Sacher: But it is uncomfortable, your Honor, to be under observation. Can't we move freely in the courtroom without having our movements remarked upon?

The Court: Well, if you haven't been moving freely in the courtroom, Mr. Sacher, then my eyes and ears have been deceiving me.

(Mr. Gordon hands paper to the Court.)

The Court: Now, let us see what this paper is that Mr. Gordon produces.

(After examining) Why, it is a press release,—doing just what you said was not being done.

Mr. Sacher: I asked Mr. Gordon—Mr. Gerson to see someone for me on the outside, and it had nothing to do with press releases, your Honor.

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

The Court: Well, I have in my hand a press release which it appears was just handed out by him and which you deny.

Now, I don't want to get into any collateral controversies here and we will just let it rest with this direction: I do not want any press releases handed around here in the courtroom or anything of that kind. Now, this isn't a propaganda place here. This is a court of justice where people are in trial and I direct that no more of that be done."

The press release which was retained by the Court bears the pictures of the defendants and was captioned, as follows:

"TRIAL OF THE TWELVE

401 Broadway—Room 1601-02—

New York 13, N. Y.—

Walker 5 2010

Public Relations Office

For Release

April 7, 1949"

The records of the Clerk of the Court reflect that on January 17, 1949, Messrs. Sacher, Gladstein, Isserman, Crockett and McCabe notified the Clerk that for all purposes relating to any matter in the trial the address of each is 401 Broadway, Room 1602, New York 13, New York, and that the office telephone number is Walker 5-2010, the same address and telephone number which appeared on the press release referred to above.

XVI. On April 19, 1949, in the course of the direct examination of the witness, Charles Nicodemus, Mr. Gladstein objected to a question which had not yet been com-

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

pleted, whereupon the following transpired (Tr. 3649-3650):

"The Court: Well, it seems to me, Mr. Gordon, there is something in that. Why don't you ask him a question without covering the matter of the other testimony? Is there something you want to direct his attention to?

Mr. Gordon: Yes, I want to ask him whether he had received any instructions.

Mr. Sacher: I object to this, your Honor, because it is quite obvious—

Mr. Gordon: Why does Mr. Sacher shout me down?

Mr. Sacher: Oh, Mr. Sacher shouting this little boy down.

The Court: Now, Mr. Sacher, you are getting back into your old form.

Mr. Sacher: Your Honor, I have consistently been in this form and no observations from the bench will change that form.

The Court: You never can tell what will happen.

Mr. Sacher: With your Honor up there I suppose that is true.

The Court: I might possibly get control of my courtroom. I think I shall."

XVII. On April 19, 1949, while Isserman was cross-examining the witness, Nowell, he asked that the record be read back. Sacher thereupon injected himself into the discussion as follows (Tr. 3549):

"Mr. Sacher: I think the Court is wrong about the matter and that the record ought to be read back.

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

The Court: Well, you know, if I am wrong as many times as you tell me I am, I must be a very bad Judge.

Mr. Sacher: No, that is not the point, but I think that in this instance the record will show it, your Honor.

The Court: This is one time, Mr. Sacher, when the record is not going to be read.

Mr. Isserman: I must respectfully except.

Mr. Sacher: I suspected that."

XVIII. On April 19, 1949, during the course of a ruling as to the extent to which cross-examination on collateral matters was permissible, the Court indicated its intention to limit such examination. Sacher thereupon said (Tr. 3511):

"Mr. Sacher: No, your Honor, you are—you are just stopping—if that be the assignment of the reason on your Honor's part, then I can simply say that the design of the ruling is to simply prevent the eliciting of the facts from this witness, and I wish to submit that—

The Court: You may just as well throw that charge against me in with the others.

Mr. Sacher: But, your Honor—

The Court: I have no intention of excluding the truth here at all."

XIX. On April 22, 1949, in the course of the direct examination of the witness, Charles Nicodemus, the Court sustained an objection made by Mr. Gladstein to a question asked by Government counsel. Sacher then arose and asked the Court to admonish Government counsel not to ask questions which were leading. The Court pointed out that the objection had been sustained. Notwithstanding

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

that Sacher already had stated the ground for his motion, Sacher then asked the Court whether he could say why he wanted the Court to rebuke Government counsel but the Court refused permission. Sacher then remarked in a sarcastic manner (Tr. 3680):

"I see, only Mr. Gordon and Mr. Nicodemus may speak."

XX. On April 22, 1949, during the cross-examination of the witness, Charles Nicodemus, Sacher asked the witness if he had pleaded guilty to an indictment for carrying concealed weapons. The Court, expressly stating that it understood that counsel was bringing out a conviction of crime, permitted him to proceed with the examination on this subject. Sacher then knew, on the basis of the entries reflected on the certified copies of the judgments in his possession, that the witness had been found not guilty on two separate charges, but he did not disclose those facts to the Court. Instead he continued the cross-examination on this subject, knowing that the Court was permitting the line of examination on the theory that evidence concerning convictions for crime was being elicited. When Government counsel were permitted to examine the judgments and sought to inform the Court of the fact that the witness had been found not guilty, Sacher exerted every effort to prevent the disclosure of these facts to the Court (Tr. 3716-3723).

XXI. On April 25, 1949, in the course of the cross-examination of the witness, Garfield Herron, by Mr. Gladstein he offered a book in evidence, to which objection was made by the Government. After argument, the Court ruled that it would not admit the entire book but, if there were some portion of it that was relevant, the Court would allow

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

that portion in evidence (Tr. 3928-3932). At this point Sacher arose and argued that it was necessary to have the book in its entirety in evidence, and he continued the argument until the Court directed him to desist (Tr. 3936). Immediately, Mr. Dennis arose and the Court stated to him that it did not desire any further argument, saying that further talk would not be for the purpose of persuading the Court in connection with his ruling, but for other purposes (Tr. 3927). Sacher thereupon arose and objected to the statement. The Court interrupted him, saying that he was not going to have the trial carried on for propaganda purposes. Sacher thereupon stated (Tr. 3937):

"I object to that. That is what the prosecution is doing. We are trying to prove the truth here and we are being estopped from proving the truth. That is what is happening."

XXII. On May 5, 1949, after the Court had heard a long argument, as to the admissibility of evidence, by Sacher and others (Tr. 4830-47), the following took place (Tr. 4847-48):

"The Court: Now, Mr. Sacher, I like to have counsel have every reasonable opportunity to argue points of law, but I am not going to have any more arguments such as you have been making in the past because they are not helpful. You go into various other cases. You say there have been no other cases, well, there have been lots of other cases. If you are going to argue the law according to the cases and the decisions and the opinions, all right.

Mr. Sacher: But, if your Honor pleases, these are cases—

The Court: There is no way to get you to stop without using a pickaxe. I never saw anything like

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

it. Don't you realize I have ruled on this thing repeatedly, I have expressed myself not once, not twice, but a dozen times on the issue of whether it is books that are being tried. I say I will hear a little more argument and you want to go on despite every way in which I try to indicate in a pleasant manner that I don't think it is going to be helpful. Why do you have to do that?

Mr. Sacher: Because I have clients to defend and I thought—

The Court: Well, go ahead and argue. I will listen.

Mr. Sacher: I have no desire to address a Judge who won't listen."

XXIII. On May 24, 1949, while Sacher was conducting the direct examination of the defendant, Gates, the following transpired (Tr. 6285):

"Mr. Sacher:

Q. And is that the commonly understood meaning of the term 'means of production' in economics generally? A. Yes.

Mr. McGohey: I object.

The Court: I sustain the objection.

Mr. Sacher: Is it—

The Court: Strike the answer.

Mr. Sacher: —on the ground the witness is not qualified, your Honor? Because you will recall, your Honor—

The Court: I have sustained the objection, Mr. Sacher.

Mr. Sacher: May I not know why so I may correct it if it is correctible?

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

The Court: I have no comment to make.

Mr. Sacher: You helped Mr. Gordon one day and I would like a little help too.

The Court: Mr. Sacher, you will please desist from this sort of thing

Mr. Sacher: All right."

XXIV. On May 26, 1949, in the course of direct examination of the defendant, John Gates, by Sacher, objection was made to a question asked of the witness, and was sustained. Sacher then asked the Court for the theory upon which the objection was sustained. The Court replied that it did not desire argument. Mr. Gladstein arose and asked the Court to inquire of the United States Attorney as to what legal grounds the United States Attorney urged in support of this objection. The Court refused to do this. Sacher then put another question to the witness, to which objection was made and sustained. Sacher angrily stated (Tr. 6532):

"I don't think there is a soul in this courtroom who knows what the words 'Past sins must be paid for now' mean unless this witness is permitted to say what ~~he~~ was talking about.

The Court: Now—

Mr. Sacher: And what is the use of laying it before the jury!

The Court: —you realize that your action now is deliberately contemptuous?

Mr. Sacher: It is not deliberately contemptuous. I am just bewildered, your Honor.

The Court: I have told you not to argue these matters, and I really am quite at a loss to understand why you so flagrantly and deliberately and

***Affidavit of F. W. H. Adams in Support of Foregoing
Petition***

persistently disobey my instruction. Probably it is because I don't shout at you, but I don't like to do that."

XXV. On May 27, 1949, after the Court had listened to an extremely lengthy argument by all counsel, including Sacher, the Court indicated that no further argument was necessary. Sacher thereupon stated (Tr. 6175):

"May I say to your Honor that I think your Honor's statements simply mean that advocacy no longer has a place in our Courts."

XXVI. On June 3, 1949, in the course of the cross-examination of the defendant, John Gates, he refused to answer a question after being directed to do so by the Court, and he was sentenced for contempt. Immediately upon the pronouncement of the judgment of contempt, Messrs. Gladstein, Sacher, Crockett, Isserman and McCabe, and the remaining ten defendants, simultaneously arose in the courtroom. The defendant, Henry Winston, and the defendant, Gus Hall, each taking several steps past the end of the counsel table and toward the bench, began in a disorderly and threatening manner to shout at the Court in loud, angry voices. They were adjudged guilty of contempt for their misconduct.

The situation at that time became so serious that it was necessary to send for additional Deputies Marshal, who were then in other courtrooms in the building, to assist in restoring order and to prevent any further incidents in the courtroom.

Messrs. Sacher and Isserman made statements to the Court, but neither of them made any attempt to assist the Court in restoring order in the courtroom, nor did the other counsel. After the defendant Dennis had made statements

*Affidavit of P. W. H. Adams in Support of Foregoing
Petition*

to the Court, he turned to his co-defendants and stated that he urged "upon my co-defendants that they at this time do not speak—they can act as they see fit—I urge them not to call for any provocation" (Tr. 6977). Only then did the ten co-defendants resume their seats in the courtroom, and order was restored.

XXVII. On June 7, 1949, Sacher objected to a question asked by the United States Attorney during the cross-examination of the defendant, John Gates. Despite the fact that the Court had frequently in the past directed counsel not to argue without leave, Sacher commenced arguing, saying (Tr. 7123):

"I should like to observe that the defendant is being tried—"

The Court interrupted him with the suggestion that he desist. Nevertheless, Sacher in a loud voice commenced to shout (Tr. 7123):

"Well, your Honor, I submit that—"

When the Court directed Sacher to stop shouting, Sacher said (Tr. 7123):

"I am not shouting and I resent the filling of the record with statements about my shouting when all I am doing is speaking vigorously, and that, I think, is part of the function of an advocate."

The Court commented that Sacher was one of the most vigorous speakers it had ever heard. Sacher continued to argue, saying (Tr. 7123-7124):

"That may be, but I say to your Honor that I resent this trying the defendant for things that came 15 years or 18 years ago, and I submit that what he is

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

being tried for is what is charged in the indictment between the years April 1, 1945, and July 20, 1948, and I also wish to say to your Honor that I don't think—

He finally subsided, but only when the Court advised him that he was proceeding in direct and wilful disobedience of the direction of the Court.

XXVIII. On June 9, 1949, during the cross-examination of the defendant, Gates, the following occurred (Tr. 7374):

"Q. I ask you if you did serve those 30 days in jail? A. That means that I did.

The Court: I see Mr. Sacher smiling.

Mr. Sacher: Your Honor takes awfully good notice about my facial expressions, but when Mr. Gladstein spoke about Mr. Gordon jumping up like a poppinjay you saw nothing.

The Court: Well, you did seem pleased. Now, you seem different.

Mr. Sacher: We are under surveillance but you never see anything that the prosecution does.

The Court: That is what you say. It may be because there is nothing done by the prosecution to make it necessary for comment.

I told you some little time ago that I wasn't going to permit you or the other lawyers to get away with anything while I was presiding here and I shall not."

XXIX. On June 9, 1949, the defendant, John Gates, was asked on cross-examination whether he had ever been convicted of a crime. He commenced to shout, saying (Tr. 7363):

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

"I am not making a long explanation. Let me answer. I did testify on direct examination—why don't you read the transcript? This is repetitious. I testified on the direct examination as to what I was convicted of, and Mr. McGohey knows it very well—"

The United States Attorney then requested that the record show that the witness had been shouting when he made the last answer. Thereupon, Sacher stated (Tr. 7364):-

"May the record show that the witness is being crucified unnecessarily with interrogations to which he has truthfully answered already."

When the Court directed that this remark of Sacher's be stricken, Mr. Crockett arose and, in the presence of the jury, said (Tr. 7364):

"May the record show that this is the fifth day of the witness's imprisonment in jail."

The Court remarked that it would not be provoked into an answer the Court might later regret. Sacher then stated (Tr. 7364):

"I object to that. We are the ones who are being injured and we are not being permitted to complain of the injury that is being inflicted on us. I think in the present state of the record, your Honor, it ill becomes anybody here to claim any martyrdom."

XXX. On June 30, 1949, in the course of the cross-examination of the defendant, Gilbert Green, by the United States Attorney, he was interrogated concerning a series of false statements in an application which he had prepared. When pressed for an answer concerning one of the

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

false statements, the witness became evasive. An objection by Isserman was overruled. Sacher, who did not represent the witness and who was not participating in the examination of him, arose and interjected, as an attempted diversion (Tr. 8895):

"I would like to quote the Court and say 'This is pretty small pickings.'"

XXXI. On August 1, 1949, the witness, Yolanda Hall, refused to answer a question (Tr. 11,070). The following then occurred (Tr. 11,071-73):

"The Court: Do you remember the oath you took when you were sworn as a witness?"

Mr. Isserman: I object to that question.

The Witness: Yes.

The Court: Overruled.

Q. Now, before you—

Mr. Gladstein: May I object to the Court's—the inference from the Court's statement?

The Court: Your objection is noted. It is overruled.

Mr. Gladstein: Because the Court's statement has nothing to do with that.

The Court: I will hear no argument.

Mr. Gladstein: I want to note my objection on the record.

The Court: You have noted it. Sit down.

Mr. Gladstein: I object to that and ask your Honor to admonition the jury—

The Court: Will you sit down or must I call an officer to put you down? I will have no more interruptions on cross-examination. Your field day is over.

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

Mr. Gladstein: I resent your Honor's remarks
as—

The Court: Mr. Marshal, will you please—
all right, I see you sat down by yourself.

Mr. Isserman: May I object to your Honor's
remarks and ask for a mistrial on the basis of
your Honor's remarks?

The Court: Denied.

Defendant Dennis: Your Honor—

The Court: I want no argument, Mr. Dennis.

Defendant Dennis: May I make an inquiry of
the Court?

The Court: You may.

Defendant Dennis: I would like to know whether
the ruling and remarks of the Court are directed
to the defendants and counsel as to prejudice
our case before the jury?

The Court: They are not. I have heard enough
from Mr. Gladstein. I have heard enough interruptions
and suggestions to witnesses and so on,
and I will have no more interruptions of cross-
examination. Now, that is final and that is over
for this trial.

Mr. Sacher: I wish to object to your Honor's
remarks as being wholly improper and unjustified,
and designed to prejudice the jury against the
defendants.

The Court: Your motion is denied."

XXXII. On August 5, 1949, shortly after the cross-
examination of the witness, Robert Manewitz, by the United
States Attorney began, he was asked when he had resumed
activity in the Young Communist League. Thereupon, the
following occurred (Tr. 11,577-11,578):

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

"Mr. Sacher: I object to this line of questioning.

The Court: Overruled.

Mr. Sacher: I was kept from—

The Court: I will have no interruption of the cross-examination; that is over.

Mr. Sacher: Even if it is justified?

The Court: I do not desire argument from you, Mr. Sacher—nor impertinence either."

XXXIII. On August 29, 1949, during the direct examination of the defense witness, Max Weiss, Isserman sought to elicit testimony concerning the disaffiliation by the Communist Party from the Communist International. When the Government objected, the Court heard argument by Isserman and by the United States Attorney and then overruled the Government's objection (Tr. 13,334-13,337). After some testimony on the subject, the Court sustained an objection to a question concerning a statement at a convention, and Sacher interjected himself and implied a partiality in the Court's rulings in permitting argument.

In doing so, he again persisted in arguing despite the Court's express statement that it would not hear him (Tr. 13,338):

"Q. Either at the National Committee meeting which you attended in 1940 or the convention you attended in 1940, was there any statement made by anyone that the decision to disaffiliate was one that was a Comintern decision?

Mr. McGohey: Objection.

The Court: Sustained.

Mr. Sacher: May I be heard on that, your Honor?

The Court: No.

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

Mr. Sacher: In view of the fact that Mr. McGohey—

The Court: I will not hear you.

Mr. Sacher: But Mr. McGohey was permitted to make a statement concerning this.

The Court: Mr. McGohey responded to a question from me and further asked leave to address the Court which I permitted. I do not desire to hear you.

Mr. Sacher: I have asked your Honor for leave.

The Court: Please be silent, Mr. Sacher. Again you are deliberately contemptuous.

Mr. Sacher: I am asking an opportunity to reply to Mr. McGohey.

The Court: Go ahead, Mr. Isserman."

XXXIV. On September 9, 1949, during the direct examination of the defendant, Carl Winter, Mr. Crockett asked him a question concerning the Black Legion, to which objection was made. The Court sustained the objection and at the same time stated that it did not want argument. Nevertheless, the following occurred (Tr. 13,893-13,894):

"Mr. Crockett: May I point out—

The Court: I don't want further argument.

Mr. Crockett: I wanted to say—

The Court: I think you are in contempt now. Don't do it. I will not have any more. The time for that is over.

Mr. Sacher: I wish to object to your Honor's characterization of Mr. Crockett's conduct as contempt.

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

The Court: You may object. You have done enough of it yourself."

XXXV. On September 14, 1949, the following occurred during the cross-examination of the defendant, Carl Winter, concerning his use of an alias (Tr. 14,240-14,241):

"Q. Now, I show you what purports to be the Los Angeles Extended Area Telephone Directory of March 1943, issued by the Southern California Telephone Company and I direct your attention to page 202—

Mr. Sacher: Just a moment. I object to that question.

The Court: Overruled.

Mr. Sacher: I would like to be heard if I may.

The Court: I don't desire to hear you, Mr. Sacher.

Mr. Sacher: Will there come a day, your Honor, when you will hear us!"

XXXVI. On September 29, 1949, while arguing a motion at the end of the case, the following occurred (Tr. 15,208-9):

"Mr. Sacher: . . . They [the early Christians] did so many things, more than this evidence disclosed, that if Mr. McGohey were a contemporary of Jesus he would have had Jesus in the dock.

Mr. McGohey: Your Honor, I resent that.

The Court: I don't blame you.

Mr. McGohey: That is the most unconscionable thing I have ever heard, your Honor. I have been born and raised in this city. It is well known that

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

I am a member of the Catholic Church. I firmly, with all my heart, believe that Jesus Christ is Divine, that he is the Son of God, and to have it said in this courtroom, where I am a member of the bar, that I would have persecuted my God is an insult that I can't resist interrupting for.

The Court: Please refrain from any such reference again, Mr. Sacher. That was quite improper, and I don't blame Mr. McGohey at all for resenting it; anyone would.

Mr. Sacher: I say to your Honor—

The Court: It is a terrible thing to say.

Mr. Sacher: I say to your Honor that the resort to so-called secrecy—

The Court: You don't even apologize for it.

Mr. Sacher: I am proceeding with my argument, your Honor. I have no apologies to make."

16. Throughout the entire proceedings Sacher systematically and persistently, in disregard of the repeated warnings and orders of the Court, needlessly delayed the trial, argued without permission; refused to desist from argument and comment; improperly interrupted the Court and counsel; asked improper questions with respect to matters already excluded; made insolent, sarcastic, impertinent and disrespectful remarks to the Court and conducted himself in a provocative manner; shouted, snickered and sneered, all without regard or respect for the dignity of the Court, the judicial office, and the administration of justice, and without any regard for his duty as an attorney and his obligations as an officer of this Court. Some instances of such conduct in addition to those previously set forth are to be found at the following places in the record:

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

<i>Ch. Tr.</i>	<i>Tr.</i>	<i>Tr.</i>	<i>Tr.</i>
870	137-8	3248	9756-7
1147, et seq.	142	3680	10583
2494-95	457-9	3765-8	10672
2549-51	662	4147-8	10698-700
2625-27	753-4	4241-3	10765-66
2682-85	780-4	4715	10785
2694-6	785	4800	10788-9
2973	1359	5808	10577-78
3105-7	1372-4	5883	11610-11
3174-6	1475-8	6219-20	12725
3273	1583-6	6532	12322-3
3287-8	1731	7123	12848-9
3418-25	1877-9	7273-3a	13338
3649-50	1975-6	8895	14241
3857	2017-21	8904-5	14913-4
3870-2	2479	9597-9	14929
4100-1	2813	9691	14982
4701	3194		

17. The record further discloses the following conduct on the part of Isserman:

I. On August 1, 1949, the witness, Yolanda Hall, called by the defense, was asked a question on cross-examination and then the following transpired (Tr. 11,031):

"Mr. Isserman: I object to that as argumentative. It is not based on the facts in evidence as testified by this witness.

The Court: Mr. Isserman, do you remember my admonition, that when counsel objects, counsel is merely to state 'I object'? You have violated it several times this morning. Did you forget?

Mr. Isserman: I am reminded of it now. It is a habit that goes back over 25 years. It is hard to

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

give up that habit, which your Honor has undoubtedly engaged in yourself.

The Court: Every time you do that your action is contemptuous and direct, I think, wilful and deliberate disobedience of my command.

Mr. Isserman: I must object to your Honor's characterization of my conduct.

The Court: I have heard counsel for the defense here again and again give various excuses, say they have forgotten or it was inadvertent, and I have warned them again and again. I now say that such conduct must be and I find it to be wilfully and deliberately done and contemptuous.

Mr. Isserman: I must object to your Honor's finding.

The Court: Very well."

II. On August 3, 1949, during the direct examination of the witness, Geraldyn Lightfoot, by Isserman, she was asked a question to which the Government objected. The Court undertook to elicit the information sought by a direct question. In order to forestall an answer, Isserman and another of the defense counsel, Mr. Gladstein, provoked a disorderly disturbance and succeeded in preventing an answer to the question, as follows (Tr. 11,269-11,274):

"The Court: Mrs. Lightfoot, in this matter of the strategy of the workers, did you discuss the dictatorship of the proletariat, imperialism, and just and unjust wars, and things of that kind, or were they not mentioned?

Mr. Isserman: I object to the question.

The Court: Overruled.

The Witness: Under topic 3—under topic C—

The Court: You will answer that question yes or no or state that you cannot answer it.

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

Mr. Gladstein: I object to the Court's tone and manner of badgering the witness.

The Court: There is nothing about my tone, and you will please sit down.

Mr. Gladstein: I desire to make an objection.

The Court: Mr. Marshal, will you just—

(To the reporter) Read the question to the witness.

We will have no more monkey business here.

Mr. Gladstein: I object to the ruling.

Mr. Isserman: I object to the Court's remark.

The Court: You will sit down, Mr. Gladstein.

Mr. Isserman: And I want to register an objection to the Court's ruling.

The Court: Very well.

Mr. Isserman: As prejudicial to the conduct of the case and to the defense and making the defense impossible.

The Court: When I desire to ask a question, I am going to ask it. I am through with the interference of counsel.

Now, go ahead and read the question, Mr. Reporter.

Mr. Isserman: May I ask the Court a question?

The Court: You may not.

(Question read.)

Mr. Isserman: I object to that question.

The Court: Overruled.

A. Under C I discussed—

The Court: Mrs. Lightfoot, did you hear me tell you to answer that question, either that you did discuss those subjects or that you did not discuss those subjects? Now, which was it? You did discuss them or you did not discuss them.

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

Mr. Isserman: I object to that question.

The Court: Overruled.

Mr. Gladstein: Your Honor—

The Court: Overruled. I don't want to hear anything from you, Mr. Gladstein.

The Witness: The way that the question was—I heard the question. It says—

The Court: Then, you will answer it the way I tell you to, Mrs. Lightfoot. Now, did you discuss those subjects or did you not?

The Witness: The question includes 'things of that kind,' and—

The Court: Then, I will take out "things of that kind."

Did you—

The Witness: May I hear the question?

The Court: I will give it over again.

Did you in that lecture discuss, when treating the subject of the Strategy of the Workers, the Dictatorship of the Proletariat, Imperialism, Just and Unjust Wars, or any of them?

The Witness: Well, were they mentioned during the course of that discussion, is that what you are asking me?

The Court: Well, I suppose that word 'discuss' has some peculiar meaning in the Communist Party—

Mr. Isserman: I object to that characterization.

The Court: I will reform my question.

Did you mention to the class in that lecture the subject of the dictatorship of the proletariat?

The Witness: I didn't mention it at that lecture—

Mr. Isserman: Just a minute. First of all I wish to object to your Honor's question—

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

The Court: Mr. Isserman, I am not going to have any interference here. Now, you will just go over there and sit down and then you can say what you want to say afterwards.

Now, Mr. Marshal, just escort Mr. Isserman over to the seat.

Mr. Isserman: I would like to make an objection to your Honor's question. Am I allowed to do it?

The Court: You have made it. Go back and sit down there.

(The Marshal escorts Mr. Isserman to the seat.)

(Mr. Isserman rises.)

Mr. Isserman: Well, I rise now to object to your Honor's question.

The Court: Overruled.

(Mr. Isserman is seated.)

The Court: Now, Mrs. Lightfoot, you will give me a direct and responsive answer to that question. In that lecture did you discuss the subject—did you mention the subject of the dictatorship of the proletariat?

Mr. Isserman: I object to that question.

The Court: Overruled.

Mr. Marshal, will you show Mr. Isserman to his seat?

Mr. Isserman: May I not stand at this point?

The Court: You will sit right down. I have had enough contemptuous conduct from you and I am not going to have any more.

Mr. Isserman: I am not aware of any contemptuous conduct.

The Court: Well, you will be aware, all right.

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

Mr. Isserman: I would like to object to your Honor's remark and I move for a mistrial because your Honor has made the defense impossible.

The Court: Mr. Marshal, get busy.

(Mr. Isserman sits down.)

The Court (To witness): Now, answer that question.

Mr. Isserman: I object to that.

The Court: Overruled.

The Witness: The question—may I hear the question again now; after so much I do not remember it.

The Court: The Reporter will read it—or I will ask you again:

In that lecture did you mention the subject of the dictatorship of the proletariat?

Mr. Isserman: I object to that question.

The Court: Overruled.

A. In the beginning of that—

The Court: All right, I sustain the objection to that question. We will have no more of it.

Go ahead with your next question, Mr. Isserman."

III. On the same day, when the Court sought to elicit certain information from the same witness, which was called for by a question asked by Isserman, again Isserman and Gladstein successfully prevented the Court from obtaining an answer, as follows (Tr. 11,281-83):

"Q. At whose instance did you give that course?

A. That was a course given—

The Court: Why don't you just give the persons's name? Who was it that told you to give that course?

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

Mr. Gladstein: Well, your Honor, I object to that. It may not have been a person.

The Court: Overruled.

Mr. Gladstein: I don't think you should direct the witness that way.

The Court: Read the question to the witness, please Mr. Reporter, and see if we can stop this circumlocution.

(Question read.)

A. This course was given—

The Court: Now, Mrs. Lightfoot, you are going to say at whose instance it was. That means giving the name.

Mr. Isserman: I want to object to that question.

Mr. Gladstein: I want to object to the Court making a direction to this witness and pointing his finger at the witness in an intimidating way. I assign that as misconduct, your Honor.

The Court: Mr. Gladstein, you are perfectly wonderful the way you make these things up.

Mr. Gladstein: I beg your pardon?

The Court: Oh, you go ahead now.

Mr. Gladstein: Does your Honor deny that you—

Mr. McGohey: Oh, if the Court please, can't we get on with the trial and stop this nonsense?

The Court: I raised my finger, and the rest of it is sheer imagination but done deliberately. I know what you are up to, Mr. Gladstein. You and your colleagues here are trying, and again and again have made positively false statements in the record for the purpose of making me appear

*Affidavit of F. W. H. Adams in Support of Foregoing
Petition*

to be biased and prejudiced and to do the wrong things, that I am not doing. However, I am not going to sit silently by and have you do that.

Mr. Gladstein: I deny that part of your Honor's statement which charges me with making false statements.

The Court: I happen to be in charge of this case and I happen to be in charge of this court.

Mr. Gladstein: I know, your Honor, but I wish the record to show that I deny that part of your Honor's statement that charges me or my colleagues with any false statements, and I not only agree with but affirm that part of your Honor's statement which is to the effect that your Honor is biased and prejudiced.

The Court: Did I say that? I say you said so very often, and at your table things seem to be unanimous on that subject. You have attacked me again and again and I suppose you will continue to do it.

Now, go ahead, Mr. Isserman.

Mr. Isserman: I join in Mr. Gladstein's denial and object to your Honor's remarks.

The Court: Yes. • • •

IV. The conduct set forth above in paragraph 15, subdivisions VI, IX, XXVI.

18. Throughout the whole case Isserman also systematically and persistently, in disregard of the repeated warnings and orders of the Court, needlessly delayed the trial, argued without permission; refused to desist from argument and comment; improperly interrupted the Court and counsel; asked improper questions with respect to

Respondents' Answer

matters already excluded; made insolent, sarcastic, impertinent and disrespectful remarks to the Court and conducted himself in a provocative manner; all without regard or respect for the dignity of the Court, the judicial office, and the administration of justice, and without any regard for his duty as an attorney and his obligations as an officer of this Court. Some instances of such conduct in addition to those previously set forth are to be found at the following places in the record:

<i>Ch. Tr.</i>	<i>Tr.</i>	<i>Tr.</i>	<i>Tr.</i>
2541-2	76	3256	8219
3173	457	3437	8578-9
3176-7	1358	6037	11031
4781	1506-8	7892-5	11247
	1877-79	8099-8100	12566-70
	2336-42	8211-8212	12809
			13346

(Sworn to by F. W. H. Adams, on January 17, 1950.)

Respondents' Answer

This proceeding arises out of the participation of the respondents as attorneys for a number of the defendants in a nine months' trial of the leaders of the Communist Party, U. S. A., in the United States District Court for the Southern District of New York which ended on October 21, 1949. The defendants in that trial were charged and convicted of a conspiracy to teach and advocate ideas allegedly prohibited by the Smith Act, and to organize the Communist Party of the U. S. A. as an organization which taught and

Respondents' Answer

advocated the prohibited ideas. The defendants were not charged with any conspiracy to commit any act of force or violence or other illegal acts, nor were they charged with the commission of any overt act, legal or illegal. The conviction of the defendants is presently on appeal. Petition for writ of certiorari was filed in the United States Supreme Court on September 27, 1950. The Government's answering memorandum, filed on October 12, 1950, declares that the Government does not oppose the granting of certiorari—at least on the questions of constitutionality involved in the construction and application of the Smith Act to the defendants.

The petition charges essentially (par. 14) that the respondents and their co-counsel joined in a wilful, deliberate and concerted effort to delay and obstruct trial proceedings in order to prevent a jury verdict and to bring the Court and the Federal judicial system into disrepute. The specific methods alleged to have been used by the respondents and their co-counsel were to divert the attention of the Court and jury from the charges in the indictment, to attack all the judges of this Court, including the Presiding Judge, and to attack the jury system of that court. Reliance is placed upon the entire record of the trial* and upon certain instances of alleged misconduct. Specific reference is made to a finding by the trial judge (par. 10) that the challenge to the system of jury selection instituted by the defendants was "unfounded" and was presented for the purposes of obtaining delay and to bring the administration of justice into disrepute. From the record it is clear that these charges of conspiracy and improper conduct are primarily based upon the respondents' challenge to the system of jury selection and upon respondents participation in various motions made in con-

* All record citations, all reference to the record are the printed record.

Respondents' Answer

nection therewith and in connection with the trial proper, including motions for continuance made before the commencement of the trial and motions for mistrial made thereafter.

The respondents will demonstrate from the very record itself which petitioners have placed before this court, that the deliberate and concerted efforts of trial counsel in making the various motions and the challenge to the system of jury selection were efforts required by the unusual character of the indictment, the issues to be tried thereunder and by the unusual circumstances under which the jury had to be selected and those issues had to be tried.

It will be demonstrated from the record that the jury challenge and motions were essential components to the defense of our clients under existing circumstances. Had respondents failed to undertake them, they would have been derelict in their duties as members of the Bar. The respondents and their co-counsel sought to obtain for their clients a fair trial when all objective factors pointed to the extreme difficulty, if not the impossibility, of such a trial. The respondents sought protection for their clients against a verdict such as has so often in the past been rendered in political trials in periods of hysteria, and been regretted in the calmer times which follow. In this effort, respondents sought, not as the petition charges, to bring the administration of justice into disrepute, but to maintain the guarantees of the Bill of Rights in a hysterical atmosphere which threatened to subvert those guarantees and to result in a miscarriage of justice.

Prior to the commencement of the trial, as well as during its progress, respondents and their co-counsel presented persuasive evidence that there had been engendered against all Communists, and more particularly against their clients

— *Respondents' Answer*

as the leaders of the Communist Party in the United States, so intensely hostile a public opinion on the very issues to be tried as to make it practically impossible to obtain an impartial jury and a fair trial. (e. g. motions for continuance and exhibits, 17 R 12188, 12979, 13007, 13181, 13197; mistrial motions and exhibits 17 R 13321, 13432, 13499.)

That the respondents and their co-counsel had a reasonable basis for this conclusion is established by the following language in the opinion written by Chief Judge Learned Hand on behalf of the Court of Appeals on the appeal taken by the defendants from their convictions (183 F. 2d 201, 226):

"Next it is urged that it was impossible in any event to get an impartial jury because of the heated public feeling against Communists. That such feeling did exist among many persons—probably a large majority—is indeed true . . ."

That this prejudice against defendants was nation-wide in extent was acknowledged by Judge Hand when he declared that (183 F. 2d 201, 226):

"It was not as though the prejudice had been local, so that it could be cured by removal to another district . . ."

That the respondents and their co-counsel had reason to believe that a trial in such an environment would not be one that satisfied the requirements of due process, which the Fifth and Sixth Amendments to the Federal Constitution guarantee to all persons, would seem clear from the ringing dissent of Mr. Justice Holmes in *Frank v. Mangum*, 237 U. S. 309, where on behalf of himself and Mr. Justice Hughes, he wrote as follows:

Respondents' Answer

"Whatever disagreement there may be as to the scope of the phrase 'due process of law', there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard." (p. 347) —

• • •
 "This is not a matter for polite presumptions; we must look facts in the face. Any judge who has sat with juries knows that, in spite of forms, they are extremely likely to be impregnated by the enviroing atmosphere." (p. 349)

• • • It is our duty • • • to declare lynch law as little valid when practiced by a regularly drawn jury as when administered by one elected by a mob intent on death." (p. 350)

Despite its recognition that there was a "heated public feeling against Communists" which was shared by "probably a large majority" of the people throughout the United States, the Court of Appeals sustained the convictions declaring in this respect (183 F. 2d 201, 226):

"Next, it is urged that it was impossible in any event to get an impartial jury because of the heated public feeling against Communists. That such feeling did exist among many persons—probably a large majority—is indeed true; but there was no reason to suppose that it would subside by any delay which would not put off the trial indefinitely. The choice was between using the best means available to secure an impartial jury and letting the prosecution lapse. It was not as though the prejudice had been local, so that it could be cured by removal to another district;

Respondents' Answer

it was not as though it were temporary so that there was any reasonable hope that with a reasonable continuance it would subside. Indeed, as it turns out, it is probable that the trial was at a less unpropitious time than any that has succeeded it, or is likely to follow. Certainly we must spare no effort to secure an impartial panel; but those who may have in fact committed a crime cannot secure immunity because it is possible that the jurors who try them may not be exempt from the general feelings prevalent in the society in which they live; we must do as best we can with the means we have"

This is not, of course, the place to discuss the merits of the foregoing holding. It is, however, pertinent to respondents' defense to point out that the foregoing is the first decision by any Court that has come to their notice that a conviction may stand, despite the impossibility of getting an impartial jury, because the prejudice directed against the defendants was not local and, in retrospect, appears not to have been "temporary" in character.

Whether the historic guarantees of the Fifth and Sixth Amendments of trial by an impartial jury and of due process may be withheld in a given case because the prejudice which makes a fair trial impossible may be of such duration, is a question that must await the decision of the Supreme Court. But, however that question may be decided, one thing seems clear: Whenever a lawyer in a criminal case has evidence which reasonably tends to establish the existence of such prejudice as will render it improbable that an impartial jury and a fair trial can be had, it is his duty, not only to his client, but as a minister concerned with the due administration of justice, to lay the same before the Court and to seek such relief, whether it be

Respondents' Answer

continuance, mistrial or dismissal of the indictment, as will avoid a trial held in violation of the guarantees of the Fifth and Sixth Amendments.

The Preamble to the Canons of Professional Ethics declares:

"The future of the Republic, to a great extent, depends upon a maintenance of justice pure and unsullied."

Canon 5 of the Canons of Professional Ethics declares, in part, as follows:

"It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. *Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.*"

Canon 15 of the Canons of Professional Ethics declares, in part, as follows:

"The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exercise of his utmost learning and ability,' to the end that nothing be taken or withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. *In the judicial forum the*

Respondents' Answer

client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense."

Surely, the duty which the ethics of their profession thrust upon the respondents and their co-counsel was not lessened by the fact that the enveloping prejudice against their clients was not local in character and, as subsequent events showed was not to be of brief duration. Given the prejudice which the Court of Appeals found, it was clearly the duty of the respondents and their co-counsel, by every proper means to postpone even to avoid a trial which seriously threatened to result in deprivation of the liberty of their clients without due process. It is difficult to conceive that, in the context found by the Court of Appeals, the respondents and their co-counsel could, consistent with their duty, have refrained from inviting the attention of the trial judge by their motions for continuance, mistrial and dismissal of the indictment, to the enveloping prejudice, and to press vigorously for a trial at a later period.

The respondents and their co-counsel could not and did not foresee when they made their various motions prior to and during the trial what the Court of Appeals long after the trial saw in retrospect, namely, that "it was not as though (the prejudice) were temporary so that there was any reasonable hope that with a reasonable continuance it would subside" and that "as it turns out, it is probable that the trial was at a less unpropitious time than any that has succeeded it, or is likely to follow." Though the prejudice engendered against the defendants in the *Dennis* case was most virulent in character and nation wide in scope, respondents and their co-counsel were encouraged by our country's past experience with periods of popular

Respondents' Answer

hysteria, to hope and believe that given a reasonable continuance the prejudice would subside. For our national history attests that such hysteria is of relatively short duration, particularly as it affects political dissent.*

If, as subsequent events showed, the prejudice did not subside, it was because those arrayed against the defendants would not allow it to subside. As appears from the voluminous affidavits and exhibits submitted on behalf of the defendants in support of their several motions for continuance, mistrial and dismissal of the indictment on grounds of existing prejudice, between November 1948 and September 1949, there was a continuing stream of propaganda directed against Communists which fanned the hysteria against Communists and those thought to be Communists to such a point that it broke out into physical violence, of which Benjamin J. Davis, Jr. and Irving Potash, two of the defendants in the *Dennis* case, were victims at Peekskill, which is within the Southern District of New York on September 1949. Therefore the obligation of respondents and their co-counsel to present the matter to the Court was a continuing one.

In an atmosphere so charged with prejudice it was the minimal duty of all concerned in the trial—not only of the defense lawyers, but of the trial judge and prosecutor as

* In an affidavit by Clyde R. Miller, authority on public opinion and propaganda, sworn to November 5, 1948, submitted by defendants in support of their first motion for a continuance, made on November 8, 1948, the following is stated (17 R.12943; 12954):

"History has proven, however, again and again, that after a period of time elapses, people who have been emotionally disturbed by certain words or symbols and ready to destroy persons or programs associated with those, can become detached and objective and scientific and judicious. Because the anti-Communist propaganda reached a crescendo in the course of the recent election campaign with all its attendant anti-Communist propaganda, it might be reasonably expected that even with the lapse of even a few months, it might subside and that a fair trial may become more possible."

Respondents' Answer

well—to use “the best means available to secure an impartial jury” and to “spare no effort to secure an impartial panel” (Chief Judge Hand’s Op., 183 F. 2d 201, 226). The indictment made it clear that in the presentation of the case the prosecution as well as the defense, would lay before the jury the major aspects of the teachings, doctrines and principles of the defendants and the Communist Party. For the indictment charged in paragraphs 6, 9 and 10 thereof (Record p. 4) as follows:

“6. It was further a part of said conspiracy that said defendants would bring about the organization of the Communist Party of the United States of America as a society, group, and assembly of persons to teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and would cause said Convention to adopt a Constitution basing said Party upon the principles of Marxism-Leninism.”

“9. It was further a part of said conspiracy that said defendants would publish and circulate, and cause to be published and circulated books, articles, magazines, and newspapers advocating the principles of Marxism-Leninism.

“10. It was further a part of said conspiracy that said defendants would conduct, and cause to be conducted, schools and classes for the study of the principles of Marxism-Leninism, in which would be taught and advocated the duty and necessity of overthrowing and destroying the Government of the United States by force and violence.”

At the heart of the teachings, doctrines and principles referred to in the foregoing paragraphs of the indictment,

Respondents' Answer

lay the following, as stated on defendants' notice of motion on the challenge to the jury array (17 R. 13040-1):

"Defendants have been indicted and face trial because of their advocacy and teachings of the principles of Marxism-Leninism and their participation in the Communist Party of the United States based upon such principles. For many years defendants have devoted themselves to the welfare and interest of the working class, the unemployed, the poor, the oppressed and the victims of economic, racial, national and political discrimination, all of whom are within the excluded groups described herein. In so doing defendants personally and as members and officers of the Communist Party of the United States did for many years and now do espouse, advocate and teach social, political and economic views which are antagonistic to the interests of the class or group comprising the rich, the propertied and the well-to-do as herein described, of which the juries in said courts are the organ.

"The Constitution of the Communist Party of the United States referred to in the indictments (a true and correct copy of the whole of said Constitution is attached hereto and by this reference is incorporated herein) provides in part as follows:

'The Communist Party of the United States is a political party of the American working class, basing itself upon the principles of scientific socialism, Marxism-Leninism. It champions the immediate and fundamental interests of the workers, farmers, and all who labor by hand and brain, against capitalist exploitation and oppression. As the advanced party of the working class, it stands in the forefront of this struggle.' (Preamble.)

Respondents' Answer

'The Communist Party recognizes that the final abolition of exploitation and oppression, of economic crises and unemployment, of reaction and war, will be achieved only by the socialist re-organization of society—by the common ownership and operation of the national economy under a government of the people led by the working class.' (Preamble.)

'The purposes of this organization are to promote the best interests and welfare of the working class and the people of the United States, to defend and extend the democracy of our country, to prevent the rise of fascism, and to advance the cause of progress and peace with the ultimate aim of ridding our country of the scourge of economic crises, unemployment, insecurity, poverty and war, through the realization of the historic aim of the working class—the establishment of Socialism by the free choice of the majority of the American people.'

It would be a reasonable hypothesis, in the calmest of times, that those substantially endowed with property and the social position and power which often go with wealth would regard these principles and the defendants who taught them, with an antipathy that might not be shared by those not similarly endowed. A proper regard for duty not only to one's client, but to the due administration of justice, would, therefore, require, even in such times, that counsel for defense be vigilant to the end that the jury pool from which the trial jury was to be selected should not be overweighted with those who might have such an antipathy to the defense. In the context in which the *Dennis* case was brought to trial, this was a categorical impera-

Respondents' Answer

tive. So the respondents and their co-counsel did not step forth to assume a gratuitous role, but discharged the inescapable duty thrust upon them by the enveloping climate of prejudice, when they made a study of the system of jury selection in the Southern District of New York and on the basis of the results thereof, filed a challenge to the jury lists.

How substantial the evidence was in support of the challenge, is perhaps best attested by the serious and extended attention given thereto by the Court of Appeals. Of the 63 pages of his opinion, in which Chief Judge Hand dealt with some of the most important constitutional and legal questions of our time, he devoted 20 to the jury challenge. It is more than difficult to believe that so much attention would have been devoted to the matter, had there been the slightest support for what appears to be one of the main props of this proceeding, namely, the finding of the trial judge which is set forth in paragraph 10 of the petition herein and reads as follows:

"Trial counsel for the defendants have participated in a wilful, deliberate and concerted effort to delay the trial of the charges of the indictment by making the challenge to the jury lists and by including in the challenge extravagant charges of discrimination against a multitude of minority groups, which they must have known were unfounded. In the lengthy trial of the jury challenge they, acting in concert, wilfully engaged in grossly improper tactics for the purpose of obtaining further delay and for the purpose of bringing the administration of justice in this court into disrepute."

What is decisive is, as the quotations below show, that the Court of Appeals found as a fact that the jury clerks

Respondents' Answer

charged with the selection of jurors had selected them from the wealthier districts in the City of New York, and that but for such preference, there would have been substantially less representation of the wealthy on the jury list.

"The defendants next challenge the (jury) list because of the use made by the deputy clerks of the voting lists after the middle of 1942. With great detail and labor, they prepared ~~a series of~~ charts designed to prove that the clerks must have deliberately selected from the voting lists those who came from the wealthier districts of the City in preference to those who came from the poorer. The clerks themselves categorically denied this, and the judge believed them and made a number of findings that they had not had any such purpose; but the defendants answer that the distribution which actually resulted so contradicts the testimony that the findings are 'clearly erroneous'. This argument is drawn not only from the 70 grand jury panels, which we have just mentioned, but from 28 petit jury panels, taken more or less at random. The defendants say that the large disproportion of jurors on these panels coming from the wealthier districts of the City, presupposes a similar proportion among those called, and that this could not have been the result of accident, and proves that the clerks preferred the wealthier districts because they wished to pad the list with wealthier jurors." (183 F. 2d 201, 218)

"However, after making allowance both for the discovered errors in the charts, and for the unanswered possible disparities we have just discussed, it appears to us that it would not be candid to say

Respondents' Answer

that these would account for the territorial distribution of the panels analyzed in the charts. If notices were sent out upon the basis of the voting lists alone without any principle of selection, they would not, we think, have resulted in such panels as those." (183 F. 2d 201, 219)

"The clerks attempted to apply these standards (of selecting respective jurors) roughly by territorial discrimination, to which the defendants object that even though used in good faith, it resulted in weighting the list with the wealthy. There cannot, of course, be any doubt that the resulting sample is different from what it would have been, had the clerk sent out notices to all districts, based on their population, thus abandoning any effort to make any selection in advance. Moreover, we shall accept it as true, as it probably is, that the distribution of wealth in such a list would have been markedly different from the list actually made." (183 F. 2d 201, 224)

There is considerably more in the opinion of the Court of Appeals, to say nothing of the mass of evidence and exhibits adduced at the trial in support of the jury challenge, and not referred to in the Court's opinion (all of which is hereby incorporated by reference) which establishes beyond doubt that in the context in which the *Dennis* case was brought to trial, the respondents and their counsel had a professional duty to file a challenge to the jury list. And the fact that the Court subsequently rendered a decision adverse to their contentions does not detract from the propriety of their action.

Respondents' Answer

The source of the trial judge's finding which is set forth in paragraph 10 of the petition is perhaps to be found in his failure to recognize what appears to have been so clear to the Court of Appeals, namely, that there existed a "heated public feeling against Communists" which was shared by "probably a large majority" of the people of the United States. In denying defendants' motion of November 8, 1948 for a continuance on the ground, among others, of existing prejudice, the trial judge wrote an opinion in which he said (17 R 12969, 12973):

" * * I have concluded that there is no such inflamed and prejudiced state of public opinion as would prevent a fair and impartial trial or deprive defendants of any of their constitutional rights. These affidavits and exhibits indicate hostility toward Communism, but make little mention of defendants personally. There has been no outburst of popular feeling against them here."

The motion of November 8, 1948 was followed by a motion for continuance on the ground of existing prejudice, which was argued and denied on January 14, 1949, and by a motion for reconsideration of the January 14, 1949 motion which was argued and denied on January 17, 1949. The trial of the challenge to the jury list was begun on January 21, 1949. It was perhaps inevitable, that a judge who had seen no merit whatever in the defendants' request for a continuance on the ground of an envioning prejudice should, from the very outset, have regarded the jury challenge as nothing more than a device designed to achieve by indirection the continuance which he had previously denied on three separate occasions. That he so regarded it, is attested by the fact that shortly after the opening of the second day of the trial of the challenge, he said the following (1 R 465):

Respondents' Answer

"I must say that my study of this record in this interval has indicated to me, has for the first time put in my mind the thought of a series of concerted and deliberate moves to delay the case."

The trial judge made the foregoing statement despite the fact that earlier the same morning respondent Sacher stated the following to the Court (1 R 451):

"Now we are prepared to recommend certain procedures to your Honor for the shortening of the hearing . . ."

During the course of the trial of the challenge the trial judge repeatedly returned to the theme that there was "a wilful, deliberate and concerted effort here to delay the proceedings" (2 R 1279), although the respondents repeatedly suggested the adoption of procedures for the shortening of the hearing which the trial judge declined to adopt. Thus on January 27, 1949, which was the third day of the trial of the jury challenge, respondent Isserman addressed the Court as follows (1 R 594):

"Now, on this question of the time factor: I wish to assure your Honor that this is not a delaying procedure. I have been in cases, and I am sure your Honor has been in cases in which trials have gone on over an extended time, and at some point where a series of facts or related facts have to be established there will be the putting on of one or two or three or a number of witnesses, and as a pattern begins to emerge very often there will be an offer of stipulation by either side which will say, Now let us stipulate that if the following people were called their testimony would be thus and

Respondents' Answer

so; and we hoped to shorten the proceedings in that way. I would certainly say in this case we are open to such suggestion; we are willing to sit down and and try to work out some form of stipulation in your Honor's presence or outside of it, as your Honor may direct or suggest, to shorten this procedure.

"We are also willing to consider with your Honor the question of reference to some Commissioner or Master to facilitate the procedure, so that even this Court's time is not occupied to the maximum extent."

"We are also willing to try to work out a system of perhaps submitting by mail a questionnaire containing approved questions with a stipulation that on the coming in of those results we will tabulate them and consider them as if the witnesses testified, and while that is being done, to proceed with the rest of our proof."

But the trial judge did not accept the foregoing suggestions.

In the circumstances, the time consumed in the trial of the jury challenge by defense counsel was only that which was necessary. To sustain a challenge based on the discriminatory inclusion or exclusion of groups or classes of citizens eligible as jurors, the law requires proof that the discrimination practiced is deliberate, intentional and systematic. Respondents and their co-counsel were, therefore, confronted with the problem of proving the intent with which the jury clerk adopted and applied the principle of selection of jurors. Basically, there were two methods of proof open. One was to call the jury clerk

* Such a procedure was then being employed in the trial of a jury challenge in New Jersey in which between 700 and 800 veniremen were called as witnesses. The case is *State v. Mitchell*, 135 N. J. L. 591, 136 N. J. L. 420.

Respondents' Answer

and question him as to his intent. The other was to establish his intent by inference from fact and circumstance. How unrewarding an effort to establish unlawful intent through the jury clerk would be, was shown by the trial judge himself when, shortly prior to his ascent to the bench, he acted as counsel for petitioner in *Fay v. New York*, 332 U. S. 261. At page 19 of his brief in that case he told the Supreme Court that jury administrators uniformly denied discriminatory jury selection even when the discrimination was deliberate. And defense counsel called this to the trial judge's attention when he urged them to call the jury clerk (2 R 1070). Indeed, later experience with the jury clerk, Joseph F. McKenzie, confirmed the unreliability of the testimony of jury officials when their method of selection is challenged. For on cross-examination he testified as follows (3 R 1923-4):

"By Mr. Sacher:

Q. Mr. McKenzie, do you recall the following language in your affidavit, Exhibit 227:

'I have acted as jury clerk continuously for the past ten years except for a period of nine months while I was in military service'

"Do you remember that? A. I do.

Q. And do you remember your affidavit, Exhibit 227, containing the following language:

'In carrying out my duties I together with my assistants select at random from the lists of registered voters.'

"Do you remember that language? A. I do.

Q. Will you be good enough to tell the Court whether you ever selected the name of a potential

Respondents' Answer

juror from Westchester County from a list of registered voters? A. Not during my time.

Q. What is that? A. Not during my time.

Q. Then this affidavit is false, is it not, in respect to jurors selected from Westchester County? Is that right? Is this affidavit false in so far as it applies to Westchester County? A. That is correct."

Thus it appears from the record that the various motion made by the respondents and co-counsel, including the challenge to the jury, were not "attacks", but necessary steps in the defense of their clients required in the proper performance of professional duty under Canon 5 above quoted "to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law."*

The case was of an extraordinary character. Its significance in the constitutional history of our country is perhaps without precedent. At the conclusion of the trial, the trial judge who had throughout expressed the view that the case was just an ordinary criminal case, came to the realization of its historic importance. For in discharging the jury after they had rendered their verdict, he said (16 R 12522):

"Now before I discharge you I have some comments to make that I consider of extreme importance. I need not tell you of the importance of the

* What is said above is equally applicable to the charge that the respondents "attacked" "all the judges of this Court" (par. 14 of the Petition). This charge can be founded only upon the motion made at the outset of the hearing of the jury challenge that the challenge be tried before a judge not of the Southern District Court of New York. (See motion 17 R 13148-13150). An examination of this motion will indicate that though overruled, it was well within the province of defense counsel to make.

Respondents' Answer

case. It has been stressed by counsel for both sides here. Perhaps its importance transcends anything that has been said by counsel."

Recently, Justice Jackson in granting defendants' application for bail pending certiorari, described the case as a "celebrated" case.

If the case possessed these attributes, it was because it involved constitutional and legal questions of transcendent importance and unprecedented novelty. The indictment was brought under the Smith Act, which was the first peace-time sedition law enacted since the infamous Alien and Sedition Acts of 1798. The indictment accused the defendants, not of acts or conduct, but of a conspiracy to teach and advocate political doctrines and to form a political party for the teaching and advocacy of these doctrines, which were alleged to include teachings and advocacy of the duty and necessity to overthrow the Government of the United States by force and violence. No overt act, whether legal or illegal, in furtherance of the alleged conspiracy was charged in the indictment. Nor was there any claim by the Government, either in the indictment or at the trial, or any finding by the trial Court or the jury, that the teaching or advocacy complained of in the indictment created a clear and present danger of any substantive evil.

In these circumstances and in the light of the holdings of the United States Supreme Court in cases involving the First Amendment, it was the duty of respondents and their co-counsel to contend that the Smith Act and the indictment brought thereunder against the defendants were unconstitutional invasions of the freedom of speech, press and assembly guaranteed by the First Amendment. For as was apparent from the indictment and made clear by

Respondents' Answer

the Government's proof at the trial, the prosecution rested basically on the alleged distribution and circulation of books and on teachings therefrom. Many of these books, beginning with the Communist Manifesto of 1848, had long been part of the literature of all countries, including our own, and were to be found in their public libraries.* The evidence other than books and study outlines consisted very largely of proof of the activities of the defendants in connection with the reorganization of the Communist Party, its board meetings, its conventions, its constitution and its resolutions. Thus almost every item of proof was proof of an activity in the realm of speech, press, and assembly.

In view of the foregoing, the constitutional and legal propriety of each item of evidence offered by the prosecution became a question of the greatest moment. And in view of the unbalanced composition of the jury list from which the trial jury was drawn, and the envioning prejudice, which grew more intense as the trial went on, it was incumbent upon defense counsel to exercise the utmost vigilance to the end that evidence which was objectionable as an unconstitutional invasion of the rights of the defendants or as unduly prejudicing the jury against the defendants, be excluded, and that relevant evidence establishing the innocence of the defendants be admitted.

To add to the overwhelming difficulties under which defense counsel labored was the vagueness of the indictment, under which the prosecution was permitted to introduce evidence of the utterances, acts and conduct of *third persons*, who in many cases were wholly unknown to defendants, and other evidence covering a period of more than 20 years and coming from such widely dispersed places

* The books on which the prosecution rested most heavily were all circulated by the New York Public Library (15 R 11695-6).

Respondents' Answer

as Moscow (6 R 4647) to Detroit (6 R 4565-75, 4575-86) and including Massachusetts (5 R 4144-85), New York (7 R 5441-88), Missouri (7 R 5022-81) and Illinois (6 R 4862-4997) and other states.

The indictment alleged that the conspiracy was entered into in the Southern District of New York and "elsewhere", and did not specify the books, publications, teachings, schools or classes comprehended in the indictment. A bill of particulars had been denied. Respondents and their co-counsel thus faced preparation of the trial of their clients without knowledge of the specific acts, statements and documents which were to be offered as proof of their alleged advocacy and without knowledge of the time when and place where the alleged activities took place. Nor were they in a position to prepare witnesses before trial. Only as each Government witness testified did defense counsel obtain those facts which put them in a position to call for the requisite witnesses.

From all the foregoing, and from the entire record, it is clear that far from having joined in a wilful, deliberate and concerted effort for the improper purposes alleged in paragraph 14 of the Petition herein, the respondents and their co-counsel acted only in response to the heavy duty thrust upon them, by the context in which the defendants were tried, to preserve the constitutional rights of their respective clients and to prevent a miscarriage of justice. All that remains, when the charge contained in paragraph 14 is eliminated, are the individual alleged acts of misconduct of each of the respondents. When these are viewed, as they must be, in the extraordinary context in which they occurred it would seem clear, assuming that they manifested professional impropriety, that they were adequately dealt with by the contempt convictions which were imposed on these respondents and their co-counsel at the conclu-

Respondents' Answer

sion of the trial, from which there is now pending in the United States Supreme Court a Petition for review by writ of certiorari. They do not, in context, evidence unfitness on the part of either of the respondents for professional practice in which each of them has been very honorably engaged for more than a quarter of a century.

The trial was unprecedented in many ways. It was a long trial—perhaps the longest continuous trial in the history of the Southern District, beginning on January 17, 1949 and ending on October 14, 1949. It involved, as has been said, questions of transcendent political, constitutional and legal importance. It was a bitterly fought trial, under most unfavorable conditions, in an environment of extreme hostility directed not only against defendants but at defense counsel as well. If under the all but unbearable strain of such a trial, either of the respondents on occasion lapsed from standards to which they might properly be held accountable in another setting, it cannot justifiably be said that in the context of this case they so offended that banishment from practice and deprivation of the means of livelihood, whether temporary or permanent, are fitting or proper.

WHEREFORE, respondents respectfully pray that the Petition herein be dismissed.

Respectfully submitted,

HARRY SACHER,
ABRAHAM J. ISSERMAN,
Respondents.

Transcript of Hearing of November 15, 1950**Appearances:**

F. W. H. ADAMS, Esq., Attorney for Petitioners.

HAROLD SACHER, Esq., pro se,
and

ABRAHAM J. ISSERMAN, Esq., pro se, for the Respondents.

The Court: In this matter, before we proceed to fix a date for the hearing on the merits, I want to verify my understanding of the scope of the answer filed by the respondent. Notwithstanding the absence of expressed denials addressed to the complaint, I should suppose that the answer did not operate as an admission of any conclusions of law. You would agree with that, would you not, Mr. Adams?

Mr. Adams: Yes, I should, Judge.

The Court: And somewhat similarly, by familiar principles of pleading, the absence of denials addressed to any allegation of fact in the petition would operate as an admission of that fact, would it not?

Mr. Sacher: I think so, your Honor.

The Court: Well, then, that I think will support the general observation that the disputed issues of fact in this matter are of very small compass. If the allegations of fact in the petition may be taken as admitted, then very little evidence would be required to close the record of fact. Does anybody question that observation?

Mr. Sacher: I should imagine there would not be any question of your Honor's observation whatever.

The Court: It is largely a matter of argument, and argument addressed principally to the inferences that should be drawn from the underlying allegations of fact.

Transcript of Hearing of November 15, 1950

Mr. Adams: I should like, your Honor—of course we will put the record in before you, that is to say, the record of the whole case. We refer to it in the petition, and merely in the petition specifically designate particular parts of the record, but we will put the whole record before you, and while I do not now, in the present state of the pleadings, see that we will have any great necessity for additional evidence, perhaps in the interest of caution I had better reserve the right or at least indicate the possibility that we might put in some additional evidence. I should not now think that we would have to.

The Court: Then might this be understood, Mr. Adams: Although the whole record will be offered, you will confine your reliance to those portions thereof designated in the petition.

Mr. Adams: While the petition in fact, your Honor, does rely upon the record, taken as a whole, it would not be within the theory of the petitioners to be compelled to rely just on the particular specifications in the petition at page 7. The entire record which is thereafter referred to shows that to effectuate this plan which is set out previously, the respondents and other counsel have conducted themselves in a manner set forth below, and the citations made to the record indicate some but not all the instances of the conduct referred to. I simply would not like now to be limited to those particular specifications, although I think I can assure your Honor that, as a practical matter, that is the way it will end up. I think we have to put the whole record before you.

The Court: Very well. Well, understanding, then, that the submission on the merits, when it comes, will be almost wholly a matter of argument, do you feel that a day would be time enough for the needs of the case?

Transcript of Hearing of November 15, 1950

Mr. Isserman: May we have a moment, please?

The Court: Yea. I am asking not to obtain any binding commitment, but merely to explore the ground, as a judge often does before he attempts to apportion his time. I am asking merely your best estimate.

Mr. Sacher: Mr. Isserman and I think, your Honor, that a day for argument would probably be adequate. We would, of course, assume that the detailed opportunity to treat on each of the incidents which is used as a basis for this proceeding would be given us by way of submission in a brief, et cetera, so that we could address ourselves specifically to those detail matters, treating the larger questions, perhaps, in oral argument, as well as the law applicable.

The Court: Well, is it your feeling that the most satisfactory procedure for submission would be oral arguments followed by a time adequate for the preparation of written briefs?

Mr. Sacher: I should imagine so.

The Court: You think that would be preferable to a procedure whereby briefs would be submitted on the day of argument?

Mr. Sacher: No, I am inclined to think, perhaps, that it would be desirable in the first instance that your Honor should have the benefit of briefs, certainly so far as we are concerned, and then if anything should develop at the hearing which might be properly thought to require additional memorandum which would not, of course, be as comprehensive as the initial memorandum, we could then see, in the light of what developed, what your Honor might think appropriate.

I think your Honor's suggestion, if I might call it that, in the form of a question, is sound; namely, that a memoran-

Transcript of Hearing of November 15, 1950

dum treating of all of the incidents submitted simultaneously or before the date of oral argument, might prove more helpful to the Court than if we simply came and argued first and submitted afterwards.

The Court: I have some fear that written argument prepared in advance of the oral argument and submitted contemporaneously might not square with the opposing argument, and hence result in a loss of time.

I am inclined to think that I will set a date for oral argument, leaving it optional with the parties as to whether they will submit any writing at the time, but with assurance that whether so or not, that they may have an opportunity to submit a written argument after having heard the oral argument.

Mr. Isserman: May I say a word, if the Court please? We have been referring to written argument, but what we will have to submit to the Court will be something more than just argument, in this sense: The petitioners have selected a great many record references. At this point all your Honor has before you are the page numbers of those references. Now, in our answer or in our argument on those specific incidents, it will be necessary for us to go back of the page which is given and beyond the page which is given. In other words, to appraise an incident, it may be necessary to rely on 10 or 12 pages rather than on two, in order to give the Court the full benefit of the factual situation.

Now, we had in mind isolating those, doing our work on them incident by incident and isolating them and preparing them in such a way that the Court would have before it something more than a whole series of some 500 numbers, and from those incidents we will, of course, make our argument. But there is the problem of evaluating each

Transcript of Hearing of November 15, 1950

incident, or those which we believe worthy of evaluation, perhaps as preliminary to the oral argument.

The Court: I don't understand whether your observation is offered in order to accomplish a change in the procedure I suggested or to indicate that your own position is in accord with that.

Mr. Isserman: As I understand the position the Court has outlined, it is that we have an option of submitting at the time of oral argument. I was indicating we would find it necessary to submit at the time of oral argument a—

The Court: But you desire to reserve a right to file in writing later?

Mr. Isserman: That is true, and indicating I see need for some time in preparing the material which we feel necessary to have ready at the time of oral argument.

Mr. Adams: If the Court please, on the understanding that the allegations of the petition are admitted as to matters of fact, I should certainly hope that we could argue this case in a day. We will have to spend a little time putting the record in. I would be glad to have an indication from the respondents whether they agree that the record as printed by them for their clients could be admitted without further proof and, in addition, the reference, there is one part there which appeared in the proceedings before Judge Ryan, which was not printed. Will that be similarly admitted?

Mr. Sacher: Except for an objection to relevancy, but so far as competency is concerned, it is.

Mr. Adams: Mr. Isserman says that they will perhaps wish to argue from various parts of the record as to the effect of certain specific references in the petition, and that they might want to submit that kind of data to your Honor at the time of argument. I won't know what they

Transcript of Hearing of November 15, 1950

are going to rely on. If they wanted to submit that part of it to me first, it might expedite the argument, and that would be perhaps a good plan. But we are bound to agree with your Honor that this is a kind of a situation in which the best thing to do is probably to clear the air orally and then thereafter to sit down and write a brief for your Honor which would give you the position of the various parties.

The Court: The pending motion is for continuance. Is there anything that the respondents want to say in support of that motion? That is to say, directed to the desired length of the continuance?

Mr. Sacher: If we may, your Honor. I think I should preface what I have to say by saying to your Honor that the pendency of this proceeding is, of course, of no comfort to the respondents; the sooner it is disposed of, whether it be yea or nay, the better, and consequently I wish to assure the Court that we have no purpose other than these: One, to permit us the time to fulfill our commitments in the case of *United States v. Dennis*, and, two to be given just sufficient time within which to make adequate preparation for the hearing that your Honor proposes to hold.

As we pointed out in the motion for the continuance, the argument is now set for December 4th. However, there are always possibilities in a case of this magnitude and importance of requests by the Court, perhaps, for further argument; there is a question of what proceedings may be necessary upon a determination by the Supreme Court: It may be that a motion for rehearing would be deemed necessary or proper.

I think your Honor indicated at the last time we met with him that your disposition was to await the decision of the Supreme Court in *United States v. Dennis*. You did,

Transcript of Hearing of November 15, 1950

however, make some reservations concerning which you thought—I mean reservations in the sense of observing, I think, that the question of motions for rehearing might well await the eventuality of such an application, that you would not pass on it in advance.

Our time in the next few weeks, that is, up to the time of argument, will undoubtedly be taken up primarily in preparation for argument. I should say in all candor to your Honor that the clients are still seeking to obtain supplementary counsel, and it may be that they will be successful in that effort between now and the date of argument. We have gotten indication from them that they would desire an application made to the Supreme Court for a short adjournment pending the procurement of other or additional counsel. We have not yet made such an application.

So that I should think that, all things considered, and in deference to the principles that your Honor enunciated at our last meeting, perhaps the date should be tentatively set with the understanding that if the decision of the Supreme Court has not been had by that time that the matter will be adjourned until a decision is rendered. There will, of course, be an opportunity for us to engage in preparation between the time of completion of the argument on December 4th, or such other date as the Court may fix, and the date of the decision by the Supreme Court.

I mention that so your Honor may take that into account in determining what time you would deem fit to give us for the preparation of ourselves for hearing. By this time I think it is clear that there are these hundreds of items. We are ready to assume, as a practical matter, that the petition will probably rely only on those, although we would still have the task of preparing ourselves in regard to those. I do not wish to present that as constituting a

Transcript of Hearing of November 18, 1950

super-human task, but they do constitute a very formidable one inasmuch as, Mr. Isserman indicated, a considerable number of them, we believe, will take on meaning and color and significance on the basis of the context in which they appear, and it will therefore be necessary on the one hand to give your Honor a sufficient context and, on the other, not to burden him with unnecessary context, so it will require a certain amount of scrutiny and preparation.

Now, those seem to me to be the general considerations which I think ought to move the discretion of the Court in fixing the date for trial.

The Court: Do you wish to be heard?

Mr. Adams: May it please the Court, first on the question of preparation, while the respondents no doubt will be busy, so are most lawyers busy, very busy. They have had these papers since April 14th. I therefore do not think that any consideration should be given—any substantial consideration should be given—to the suggestion that they should have any time of any important nature for preparation.

In that connection I would like to say that they, more than anyone else in the world, know this record.

Secondly, we are unable to see that it is necessary to adjourn this proceeding until after the Supreme Court has acted, and if I take it, if I understand the respondents, until such other steps as might be necessary are taken,—petitions for rehearing or whatever situation may develop.

The Court: Did you understand me at the time of the earlier meetings to make any commitment on that subject?

Mr. Adams: I did not, your Honor. Frankly, I have read the transcript with great care. I think your Honor made a number of general observations as to what might or might not happen under certain circumstances, but in the posture of the case as it then existed I do not think

Transcript of Hearing of November 15, 1950

that your Honor made any commitment of that kind. Of course, as you will recall, we were rather strenuously opposed to that kind of an arrangement, and I think as it wound up and at the end it was agreed that it would be put on on this day and at that time the whole situation would be examined in the light of what was then necessary and feasible, and I certainly do not think I can quote language from this to support doing it one way or the other, your Honor, but my own judgment is that you did not make any commitment on which anyone was entitled to rely. I certainly feel free to make the argument that I am making now. I did not regard myself as bound by your Honor's ruling. I don't think you made any ruling to that effect. So that I look at it as a purely practical thing. I think if it is argued on December 4th—I will concede the Supreme Court might adjourn it—

The Court: Is the Supreme Court calendar handled in such a way that there is a reasonably firm assurance that the hearing will be held on December 4th?

Mr. Adams: In my experience in these cases of this type, your Honor, when they set it down for a day for hearing, on that day they usually fix a time, they fix in advance an hour or half an hour, whatever they are going to grant, and they hear it on that day and go right on the next day if they haven't finished, so it seems to me we are reasonably assured that this case will be argued in the Supreme Court on the 4th of December. Now, after that is done I see no reason why, within a reasonable time, we should not go forward with this hearing; and in that connection, particularly since the respondents have put in the kind of answer they have, where they have admitted the facts and where all we have is an argument on the law.

Now, what would be the course in justice or the requirements of justice after the hearing had been had and after

Transcript of Hearing of November 15, 1950

your Honor had made a determination, I could not now say, nor would it probably be proper for this Court to say, in the sense that the determination, if your Honor makes a determination, whatever the latter proceedings and steps would be—a stay or an application for a stay pending appeal—in other words, I do not see any sense of letting this thing get all tied up awaiting the possible determination of this matter now in the Supreme Court when we could get this out of the way within the next few weeks, and I think that it is very definitely in the public interest—this case, after all, has been pending now for almost ten months; it came to me a year ago, I filed the petition on January 17th—I think in the public interest as well as in the interest of the respondents it is extremely desirable that this case be determined without any further delay.

I may say, your Honor, that we would be prepared to go ahead on the basis we have outlined this morning at almost any time that your Honor would like to fix, after the argument in the Supreme Court, I assume.

Mr. Sacher: I should only like to indicate to the Court that it was not my intention to say that your Honor had made any firm commitment in the principle for the determination of date except to say that what I did state I feel was justified by the following, if I may call it to your Honor's attention, at page 14 of the minutes of our last meeting. Mr. Adams addressed your Honor, and said:

“Just to clarify this in my own mind: When there is an application in a writ for certiorari pending, two things can happen: it can be granted or denied. Your idea would be that the matter should in effect be left open until we in effect see what happens on that?”

Transcript of Hearing of November 15, 1950

And your Honor replied:

"Yes. It would perhaps be a better expression of my idea that I think we should not attempt to assign this petition for hearing until the Supreme Court has indicated either by a denial of the certiorari or by a granting of it and the case reaching final judgment."

It was on that, and I did not mean to imply that your Honor spoke with the precision of a contract, and whatever your Honor does, of course, I am sure will constitute an exercise of discretion.

I should like to say as to that, certainly I join with Mr. Adams in saying that it is to our interest to have an undelayed disposition of this. Its agonies have been tremendous. I need not say that to a judge of many years on the bench. And our only concern is just one thing, that which I indicated before, only that we simply fulfill our responsibilities in the Dennis case and thereafter that we have this time within which to prepare. Now, I did not indicate, frankly, from the point of view of period for preparation, any protracted period of time. I do say, what I think I suggested before, your Honor, was that the period of preparation could be measured by and subject to the period intervening between argument and the Court decision, Supreme Court decision. I do not have in mind going beyond that. I do believe, however, that it would seem to be desirable, if not necessary, that we should await the outcome of the argument in the Supreme Court, because there may be these additional proceedings prosecuted in good faith and with expedition, and expedition, I take it, is guaranteed by the time requirements of the rules of the Supreme Court.

Transcript of Hearing of November 15, 1950

Now, beyond that I do not think it is necessary for me to say anything, and Mr. Isserman has no desire to say anything further.

The Court: At that time it was suggested that the Supreme Court would either grant or deny certiorari. Those were supposed to be the alternative. Apparently there came no particular thought at that time to the eventuality of what actually happened, that certiorari would be granted on a limited record or limited to the question of constitutionality; and especially in view of that limitation, as I review the situation, I see no reason for delaying the hearing here beyond the time of argument in the Supreme Court, feeling that with that argument out of the way the respondents should address themselves to their interest in this petition, and it does seem to me that two weeks would be adequate time for preparation, and I am inclined to appoint the date of December 20th as the date for hearing. However, this not being a formal ruling on a formal motion, I should be glad to consider the comment of any counsel on that tentative disposition.

Mr. Adams: I simply wish to say that that date would be satisfactory to us. I did not look at the calendar.

The Court: That is a Wednesday.

Mr. Sacher: Would your Honor indulge us just a moment?

The Court: Yes.

Mr. Sacher: Your Honor, we feel that if your Honor thinks that that is an appropriate date, why, we would just accommodate ourselves to it. That is all there is to it.

The Court: Very well. We will have the trial proceed that day, and it will be satisfactory, to convenience me, to start the hearing here at 11 o'clock, but I will reserve the following day in case counsel feel that due to the late starting or to any other cause that more time is needed.

Transcript of Hearing of November 15, 1950

Mr. Adams: There is one point, your Honor, that has occurred to me as to the form of the argument. The answer is really a demurrer, it seems to me.

The Court: The answer is really anticipation of the argument, isn't it?

Mr. Adams: It is a special defense, it seems to me, and sort of an affirmative, and I wondered what order your Honor would want the argument to take, who you want to argue first and second and how you want that set up.

The Court: Yes. I think very decidedly the burden of proof is on the petitioner.

Mr. Adams: We would argue first?

The Court: You would argue first, and close.

Mr. Adams: Yes. Thank you, your Honor. One other thing—

The Court: The briefs, the written briefs that will be filed later, if counsel wish to file at all, may be filed simultaneously. Anything further?

Mr. Adams: Thank you very much, your Honor.

(Adjourned to December 20, 1950, at 11.00 a.m.)

Transcript of Hearing of December 21, 1950**Appearances:**

F. W. H. ADAMS, Esq.,
WILLIAM C. SCOTT, Esq.,
P. C. SMITH, Esq.,
Attorneys for Petitioners.

HAROLD SACHER, Esq., pro se,
and
ABRAHAM J. ISSERMAN, Esq., pro se,
for the Respondents:

Mr. Frank Serri: If the Court please, I appear in behalf of, and am a director of the New York Chapter of the National Lawyers Guild. I have been requested to appear instead of Paul O'Dwyer, the president, to make an application to this Court to file a brief in behalf of Sacher and Isserman on the part of the Chapter and to sit in as observers, I and Mr. Linder, a member of the board of directors, and if your Honor will permit, to make a brief oral argument.

I may add that our Chapter appointed a special committee, Judge, which went very thoroughly into this record and they have written a brief of some 75 or 80 pages which I consider to be a very thorough piece of work. I think it would be helpful to your Honor to have it as *amicus curiae*.

The Court: What is your position on the matter, Mr. Adams, if you have any?

Mr. Adams: One application was made by another organization before Judge Goddard of a similar nature and was denied.

Transcript of Hearing of December 21, 1950

Speaking on behalf of the petitioners we do not welcome in this court any participation by the National Lawyers Guild. We particularly suggest to your Honor that it would not be desirable, a participation in argument or any oral statement. Naturally we do not in any way intend to suggest that the Court should not accept any help from true friends of the Court.

The Court: Well, I will say that, of course, there is no objection to the gentlemen sitting in and listening and their presence is not even discouraged. But I feel on the whole that the matter is not one that should permit of active participation. The respondents have, of course, been at complete liberty to have counsel of their own choosing. I don't yet know whether they will be represented for today.

Now how is it?

Mr. Sacher: We represent ourselves.

The Court: The record will show that each respondent appears for himself?

Mr. Sacher: Yes, your Honor.

The Court: And that being their own choosing I think that the Court should not throw open the proceedings to outside parties. The practice, as I see it, involves considerable danger. If in such a matter, or indeed in any matter before the Court, briefs and arguments are received from an outside party in behalf of one side of the controversy evenhanded justice would require that similar rights should be accorded to others who might take care to appear on the other side.

Mr. Serri: Well, Judge—

The Court: If I may be permitted to complete my observation—

Mr. Serri: I am sorry, your Honor, I thought you were through.

Transcript of Hearing of December 21, 1950

The Court: No, I was not. I was going on to observe that if this process of receiving unsolicited assistance is continued to its logical conclusion it really appears to me that judicial proceedings will come to resemble what we know in New England as the Town meeting and will depend for their determination not on a careful examination of the evidence but, rather, on the show of hands.

And so it may be noted that the pending request is denied, except, of course,—

Mr. Serri: Judge, do I understand that you will not receive my brief? I assure you that this is not a show of hands nor a Town meeting. I have read the briefs, I have helped in preparing part of it and I can assure you—and I am now giving my opinion as an attorney, an officer of this Court—that the brief will be of value and be helpful to you in making your decision.

The Court: If the defendant feels or either respondent feels that it would be helpful to him and will take the responsibility of citing it I will take it as his brief.

Mr. Leo Linder: If your Honor please,—

Mr. Serri: Mr. Linder is a member of the board of directors of the City Chapter of the Lawyers Guild.

Mr. Linder: I would like to add, if I may, a few words to the request which your Honor has denied and I hope your Honor will indulge me for just a moment.

This is quite a different proceeding, a proceeding quite different from proceedings normally before the Courts. This is a disbarment proceeding initiated by two Bar Associations in the City of New York. Now it seems to me, your Honor, with all due respect, that in such a proceeding, another Bar Association, in the same city, which has taken the trouble in view of its own conception of its responsibility to the Bar and to the bench to analyze the charges made, might well be permitted to come into the proceeding

Transcript of Hearing of December 21, 1950

not in behalf of the respondents and not in behalf of the petitioners but as a friend of the Court, as a true friend of the Court.

Your Honor, I have no desire to urge upon you any consideration of any oral argument if you do not wish to receive it, but I do submit that another Bar Association ought to have the standing in this court of coming here and saying, "We too have studied the charges made, we too have considered our responsibilities to the bench and to the Bar and we, too, think that it is not in the interests of the bench and of the bar and of all the people that this disbarment proceeding should proceed.

Now we have an argument to make which is based upon a careful consideration not only of the charges but of the entire record. That argument I submit, your Honor, you ought to receive and therefore I respectfully request your Honor to reconsider your denial of our request to file a brief. If your Honor would hear argument after you read the brief perhaps your Honor might do that. But for the moment, may I respectfully request that your Honor receive the brief and file it with you and take it for such value and such help as the brief will afford you.

The Court: Motion denied.

Miss Kaufman: If it please the Court, my name is Mary Kaufman. Mr. Victor Rabinowitz, who represents a group of labor leaders, has been unable to appear in court this morning to request permission to submit a brief as a friend of the Court on behalf of various labor leaders in support of the defendants in these proceedings. He has asked me to appear in his stead, and I hereby request the Court to grant permission to submit this brief in support of the defendants in these proceedings on behalf of various labor leaders who believe that the issues before the Court in this matter are of grave concern both to them and to the public generally, and believe that in this brief they

Transcript of Hearing of December 21, 1950

have presented sufficient argument and fact that would be helpful to the Court in determining the issues.

The Court: Motion denied. Proceed, Mr. Adams.

Mr. Adams: If it please the Court, I have the honor to present to the Court my colleague, Philip C. Smith and William C. Scott, who will be with me on this case.

If your Honor please, I now offer in evidence the printed record in the case of United States v. Dennis, et al, which consists of 20 volumes, plus the volume known as Index to the Joint Appendix, and the stenographers' minutes of the proceedings in this court before Honorable Sylvester J. Ryan, District Judge, on January 3, 1949, which are not printed as part of the printed record but which are referred to in the petition.

The Court: Is there any objection?

Mr. Sacher: No objection, your Honor.

Mr. Adams: May it please the Court, we have here a set which for purposes of your reference I should be happy to have put up on your bench before you in case you want to refer to it during the argument.

The Court: I will leave it to you, Mr. Adams, to decide whether the physical transportation should be accomplished now or volume by volume as the occasion arises.

Mr. Adams: Judge, let me get this work done now, if I can.

The Court: Very well.

Mr. Adams: In the presentation, the references to pages are to the stenographic minutes. The petition was drawn prior to the time that the record was printed. Your Honor will notice that on the back of these volumes, I think in most instances—take, for example, volume 10—the first page reference on the back of the volume is to the pages there printed and underneath it in parenthesis are the references to the stenographic minutes. For ex-

Transcript of Hearing of December 31, 1950

ample, if your Honor will be good enough to turn to page 7506 of volume 10, you will see at the end of the first paragraph (T-9030).

The Court: I don't see where the page is indicated if it begins with 7500.

Mr. Adams: Turn to page 7506 of volume 10.

The Court: Yes.

Mr. Adams: At the end of the first paragraph, the beginning of the next paragraph you will see (T-9030).

The Court: Yes.

Mr. Adams: That reference is to the stenographic minutes.

The Court: In other words, the typewritten transcript.

Mr. Adams: That is correct.

The Court: Very well.

Mr. Adams: If your Honor would be good enough to refer to the petition for a moment, those references, as I indicated, all of the references in the petition, are to the stenographic typewritten minutes, and we have prepared and I now hand to the Court a list of the same references in the printed record. That is merely for your Honor's convenience (handing).

The Court: Thank you. Shall it be noted that the printed record is received as Exhibit 1 or Exhibit A? Shall you have many exhibits?

Mr. Adams: Those are all the exhibits we have, your Honor.

The Court: Then let it be received as Exhibit A.

(Deemed marked Petitioner's Exhibit A.)

The Court: I think we can waive the physical marking or the clerk can accomplish it during recess.

Mr. Adams: Thank you, your Honor. May I proceed, your Honor?

Transcript of Hearing of December 31, 1950

The Court: Proceed.

Mr. Adams: This is a special proceeding under Rule 4 of the rules of this district. The petitioners are The Association of the Bar of the City of New York and the New York County Lawyers Association. We have in our joint membership some 12,000 lawyers practicing in the city, and the membership also includes many lawyers throughout the country. The respondents are attorneys admitted to this court. The respondent Sacher is admitted to practice in the State of New York and the respondent Isserman is admitted to practice in New Jersey.

Both of them have taken the oath of office as lawyers in this court. They took this oath administered by the clerk: "You and each of you do solemnly swear that you shall demean yourselves as attorneys, proctors, solicitors, advocates, and counselors of the District Court of the United States for the Southern District of New York uprightly and according to law and shall support the Constitution of the United States of America so help you God."

It is to decide the question whether or not these respondents are fit to be members of the bar of this Court that we are here today.

I shall have to tell your Honor first a little about the background or genesis of this proceeding. It arises out of the conduct of these respondents in connection with the trial of a case in this courthouse on an indictment which was filed in July 1948, against twelve defendants. It later went to trial against eleven of them. The indictment charged conspiracy under the Smith Act to organize the Communist Party as a group who would teach and advocate the overthrow and destruction of our government by force and violence, and to teach and advocate the necessity of overthrowing and destroying the government by force and violence.

After a series of applications for delay made by the counsel for the defendants, including these respondents,

Transcript of Hearing of December 21, 1950

the case finally came on for trial before Judge Medina in this court on January 17, 1949. I may say in passing that in November of 1948 the respondents and their co-counsel, on behalf of the defendants, filed a challenge to the jury. That was withdrawn some two or three days later, despite the fact that the government at that time was anxious to have any question with respect to the jury or the jury system in this district then determined.

The trial of the challenge later filed began, as I say, on January 17th. It was finally concluded early in March, and the case went to trial on March 7th. There was a guilty verdict as to all defendants on October 14, 1949, and the sentence was imposed on October 21, 1949. At the conclusion of the trial, the respondents and the other counsel were summarily adjudged in contempt by Judge Medina, who thereupon filed an appropriate certificate and sentenced the respondents and their co-counsel.

On appeal to the Circuit Court of Appeals, that judgment of contempt was, in most respects, affirmed. It was not affirmed in respect of some technical application on the question of notice and hearing, but as to the essential questions which face this Court today, as I shall indicate to your Honor later on, the Circuit Court of Appeals has considered the question of the conduct which is what we are concerned with today.

After the conclusion of the trial, the two Bar Associations which I have the honor to represent today considered this matter very seriously, and I was requested to investigate the record, to report, and eventually from that came this petition which, as I say, was authorized by the two Associations. That petition was filed January 17, 1950, by coincidence a year after the proceedings first started.

The petition includes in it some, but not all, of the charges upon which the conviction in the contempt case was

Transcript of Hearing of December 21, 1950

based, and it includes additional charges of misconduct which were not referred to by Judge Medina directly in his contempt conviction, although he did refer to the entire record.

The petition here was considered by this Court. An order to show cause bringing it on was signed by Judge Goddard on April 14th of this year, and after a series of applications for adjournments, all I may say at the instance of the respondents, we finally find ourselves before the Court. The answer, which I shall refer to later, was filed on October 16, 1950, and is now before the Court.

I should like to touch very briefly, if I may, your Honor, on the kind of a proceeding that we are in. It is a special proceeding or in the nature of a special proceeding. The proceedings, as your Honor of course recognizes, are civil. They are not criminal, and they have all the incidents with respect to burden of proof and procedure that follow in a civil proceeding. The purpose of the proceeding, your Honor, is not to punish these respondents. Here, if I may, I will quote from Judge Knox in a case that your Honor will recall, the Matter of Aaron Sapiro, and in the disciplinary proceedings which followed that case. Judge Knox said, and I think it is as good language as you can find on the subject:

"The proceedings to discipline are civil and not criminal, and their purpose is not to punish the respondent but to purify the bar and protect the court and the public from the fraud and imposition of reckless and unscrupulous lawyers."

That is what this proceeding is about. This has been the law as far as we have been able to find since there has been any record of lawyers being admitted to the roles here or in England.

Transcript of Hearing of December 21, 1950

I shall not touch at any length now upon the standards which govern the conduct of lawyers or their duties or their obligations to the bar, to the Court, and to the public. They are officers of the Court. They are the custodians beyond all others of the integrity and honor of the court. It is their duty, because of the trust imposed in them, to maintain themselves in respect of their own lives and in respect of their clients and in respect of the court with the highest degree of integrity, far beyond that of the ordinary citizen. All of these standards that we have to consider—the tests that we use in determining, first, whether the proceeding should be brought at all and, secondly, the tests which we shall suggest that your Honor should use in determining whether or not these men are fit to continue in the bar—are contained in decided cases. They have been declared by the Bar Associations in New York State, by the New York State Bar Association and by the American Bar Association, which your Honor is of course familiar with, in the Canons of Ethics. If I may, for your convenience, I will hand you a copy of the Canon Ethics and also shall take this opportunity to hand a copy to each of the respondents (handing). Those Canons of Ethics, may it please your Honor, are identical with those of the American Bar Association.

I shall take occasion, if I may later, to refer specifically to some of those Canons and the respects in which they were repeatedly, systematically violated in the view of the petitioners by these respondents.

If I may, I turn to the petition. It is based on the conduct of the respondents as shown by this whole record which is before your Honor. That record, in the view of the petitioners, discloses a violation, as I have indicated, of almost—I will say without exception—all of the basic Canons of Ethics which have to do with governing the conduct of lawyers.

Transcript of Hearing of December 21, 1950

The petition charges that misconduct in two fundamental ways. These two fundamental charges are based in some respects on the same facts. That is to say, that, as I will indicate presently, we have first, as in paragraph 14 of the petition, a showing of concerted action on the part of these respondents, together with their co-counsel and the defendant Dennis who appeared pro se in that proceeding. That charge of concerted action is present in these entire proceedings, during the whole course of that record. These respondents and the others joined in a wilful, deliberate and concerted effort to delay and obstruct the trial and proceedings, for the purpose of causing such disorder and confusion as would prevent a verdict by a jury on the issues raised by the indictment; and for the purpose of bringing the court and the entire federal judicial system into general discredit and disrepute, by endeavoring to divert the attention of the Court and jury from the serious charge against their clients, and by making unfounded and unjustifiable attacks on the presiding judge, and all the judges of this court, the jury system in this district and by other wrongful and unjustifiable conduct.

That is the one that is contained in paragraph 14 of the petition, and it is based on the entire record.

In the petition, as your Honor will see, we have cited to the record some instances of the respects in which this plan was carried out and some instances of the conduct. I should like to emphasize that those specific record references do not constitute all of the conduct, but we rely here upon the whole record. We have, in so far as we could, collated instances and we have put them under general headings, but I should like to make it clear that the petitioners here press the charge based on the entire record.

The second kind of conduct to which we refer in the petition are specific instances of misconduct on the part of

Transcript of Hearing of December 21, 1950

these respondents quite independent and apart from the main concerted plan. As I indicated before, some of these specific instances of misconduct by these respondents personally are also necessarily part of the conduct which constituted the joint plan.

I will develop as we go along when I discuss the nature of the evidence much more definitely and specifically, if I may, the charges under both branches of the petition.

Now I spoke before of the answer. It was of some significance to me and to the petitioners that these respondents, charged with this serious misconduct, did not even deem it necessary to file an answer under oath. And I say it is most unusual conduct.

However, the answer admits all of the facts which are contained in the record and admits all of the facts charged in the petition, but necessarily does not admit conclusions of law which the petitioners may have drawn.

The answer to which I shall refer somewhat later having admitted all the facts attempts to justify the conduct of the respondents by some kind of assertion that they were only engaged in the defense of their clients, that they were using legal rights.

Actually the answer in no respect attempts to justify the conduct itself.

The charge is based on conduct in court—what they did. It is not based on how the respondents and their colleagues did or did not properly assert legal rights of their clients. We are concerned here with a misuse of the rights which are entrusted to lawyers. This is a misuse of rights, and whether or not, as I shall indicate later, these respondents felt that they should interpose certain maneuvers, whether they should adopt certain tactics, whether they should take certain positions, which we agree they were

Transcript of Hearing of December 21, 1950

justified in taking, that is not the point. The point is how they did it. Did they do it as honorable lawyers?

With that background—and may I interrupt here to say I am hoping to keep this argument as short as possible—with that background I would like to refer to the first basis of the charge, which is the charge of concerted action.

Now the petition alleges a joint design, a wilful, deliberate, joint design, on the part of those respondents, and to accomplish these ends: To delay and obstruct this trial in all the respects I previously referred to.

Now, of course, we do not have direct proof of the common design. Persons engaged in unlawful activities normally arrange to conduct those activities surreptitiously, clandestinely, and they do not come into court and say, "We have agreed to conduct ourselves dishonorably." The proof lies in all of the circumstances which appear from this record. We say that the common design will be disclosed from a development of all of the facts and circumstances which are shown by this record.

Now, there is no dispute here as to those facts and circumstances. Therefore the only question on this aspect of the case is, to what extent do those facts and circumstances support the main basis of the charge in this proceeding?

Now, there are several respects in which it seems to us the conclusion that there was a joint plan here is inescapable; that it could not have been otherwise than that these respondents joining with their colleagues concertedly attempted to accomplish this unlawful purpose, this dishonorable purpose.

First, these respondents and their colleagues, with Dennis, they represented jointly all of the defendants. Secondly, the answer itself admits joint and concerted action. On page 2 of the answer they say that the respondents will demonstrate on the record itself that the peti-

Transcript of Hearing of December 21, 1950

tioners have placed before this Court that the deliberate and concerted efforts of trial counsel in making the motions and so on, and then they go on with characteristic dialectics to justify what they say was the result of their deliberate and concerted efforts.

Next, as the record shows, these respondents and their colleagues maintained a common office; there was no conflict in this case of any kind among the defendants; none was suggested; the case was tried one for all and all for one. Even the counsel, day by day, by stipulation, agreed that if some one of them were absent those that were present would continue for those who were absent. That was all done on written stipulation.

Even in the summations the respondent Sacher implored the Court and the jury to acquit all of the defendants. The summations of the other counsel were divided by subject matter, not by pleas for their individual clients. There was not a whisper in this entire proceeding which indicated that there was any individual representation of any defendant before the Court.

All that may not be so important, although we believe it is telling evidence of their joint plan. But we want to get—

The Court: I do not consider it of much importance, Mr. Adams.

Mr. Adams: I mention, it your Honor, as introductory to what I am coming to.

The Court: It is, of course, common observation that perfectly proper trial strategy in a trial involving joint defendants will take a line of a joint defense.

Mr. Adams: Oh, I quite agree.

The Court: I simply mention that so that the respondents won't feel constrained to spend much time on that aspect of the case.

Transcript of Hearing of December 21, 1950

Mr. Adams: Perhaps I put the emphasis in the wrong way, Judge. It is introductory in this sense, that it shows you the common background and the common interest upon which we go on to show the concerted action. I quite agree with your Honor that very often the necessities of the case require counsel to cooperate in every respect.

But let me go directly, perhaps, with that background, to one incident which is referred to in the petition and admitted by these respondents, which incident is on paragraph XXVI of the petition, and which incident I would think is one of the most disgraceful things that ever happened in any courtroom, and it took place on June 3, 1949.

On that day one of the defendants refused to answer a question and was sentenced for contempt.

Now, the bare bones of the record, your Honor, did not show the facts which are charged in the petition and which are admitted by the respondents. This defendant Gates was sentenced for contempt, and at that point these respondents, their co-counsel and the defendants arose in the courtroom, and they went up toward the Court, past the counsel table, and began—and I quote here the admitted facts—“in a disorderly and threatening manner to shout at the Court in loud, angry voices, and those men that did that were adjudged in contempt. It was necessary to send for additional deputy marshals to assist in restoring order. Sacher and Isserman made statements to the Court but there was no attempt whatever, no attempt whatever to assist in restoring order, nor did the other counsel attempt to assist. Finally, Dennis, one of the co-defendants, in effect, persuaded the lawyers to retire as well as the other defendants.”

Now, that, your Honor, was a kind of action which shows, in our view, beyond any question, quite apart from anything else in this case, a concert of action which I sug-

Transcript of Hearing of December 21, 1950

gest to the Court were there nothing else in this case would warrant disbarment.

Judge Augustus Hand in the Circuit Court of Appeals referred to it "in a turbulent scene which accompanied the rulings of the court none of the appellants"—Sacher, Isserman—"attempted promptly to restore order."

But I am talking now, rather, your Honor, on the indication, the conclusion, we say, that must come from that, that there was a concerted plan, and the record will show, incidentally, that it was clear from the conduct of Gates the day prior to this incident that the Court was going to take summary action with respect to him if he persisted in his conduct. So it is, we say, compelling and persuasive that there was joint action there, and that is characteristic of the joint action that went on throughout this entire case.

Now, it is interesting that in a contempt case, when they went to the Court of Appeals for this Circuit, they argued strenuously that that conviction should be reversed because they had had no opportunity to come for a hearing at which hearing they could introduce before the Court independent evidence showing that there was no such concert, and that the concert, if any, might have taken place out of the courtroom, not in the presence of the trial judge, and therefore they had to have a hearing and were entitled to a hearing to go into that whole subject.

That is indicated in Judge Frank's opinion very clearly in that case. He says that what happened in the presence of the Court was powerful evidence of such an agreement. He said if there was an agreement it may have been made out of court, and, therefore, says Judge Frank, they are entitled to a hearing.

Here is their hearing, Judge. They admit the facts. They come forward with not one word of evidence to deny

Transcript of Hearing of December 21, 1950

the concerted action. They argued; they plead with the Circuit Court of Appeals for the opportunity for a hearing at which they presumably would come forward and show there was no concert of action, that there was no common design, that there was no wilful effort to bring this Court into disrepute. Here is their chance, and they have admitted every fact, and they have admitted the joint design.

Now, I want to turn next, if I may, your Honor,—

The Court: Mr. Adams, I am a little uncertain as to the course this proceeding has taken. Have you other evidence to introduce other than this record?

Mr. Adams: No, your Honor.

The Court: It sounds to me as though you are in the process of making a final summation of the case.

Mr. Adams: Well, my difficulty is this, perhaps, if your Honor will forgive me, I suppose I have a deep sense of personal outrage in this case.

The Court: Well, I have no criticism. When you began I thought you were making what in other cases is called an opening statement. I interrupt to observe that in view of the tenor of your last remarks that the respondents have not rested their case, and for all I know the evidence of which you just spoke as being absent may yet come forward.

Mr. Adams: I would have two answers to that, your Honor: First, in the early proceedings that we had at which this hearing was set down today, this was designed, as I understood it, to be an argument on the record; that neither side was going to put in any evidence. I certainly did not intend to suggest by that that neither side may put in evidence.

The Court: Suppose we suspend for a moment to clear the record on that score. If the petitioners have completed

Transcript of Hearing of December 21, 1950

the evidence they have to present, let me then turn to the respondents and ask them directly.

Mr. Adams: May I say this, your Honor: Your Honor refers to this subject on the hearing that we had on November 15th and after asking me and the respondents with respect to the matter of admissions your Honor observed:

"The Court: Very well. Well, understanding, then, that the submission on the merits, when it comes, will be almost wholly a matter of argument, do you feel that a day would be time enough for the needs of the case?"

And Mr. Isserman responded that a day for argument would be sufficient.

The Court: Yes, but we all know that the convenience of all concerned is served by estimating the length of the trial, but certainly there is nothing binding in such estimates and forecasts.

Mr. Adams: I should say not. As a matter of fact, your Honor may recall that I reserved the same right myself.

If I may trespass one more moment on this point, on this question of the admissions, to which I am just referring, whether there were a hearing or not, whether evidence were introduced or not I would continue to make the same point with respect to the nature of the admissions.

However, I certainly like to know myself the course this proceeding is taking.

The Court: It is time to find out.

Let me then say to the respondents if either of them have any evidence to offer the opportunity is now presented.

Mr. Sacher: If it please the Court, we do not intend to introduce any evidence except perhaps to introduce one or

Transcript of Hearing of December 21, 1950

two documents which will become, so to speak, germane in the course of our own argument. They are comments really on us respondents, one by Mr. Justice Frankfurter in an opinion which he handed down recently, and the other is one concerning myself which I will ask your Honor to consider, but it doesn't go to the evidence in the case itself, and we shall point out to your Honor the places in the record which not only negate but demonstrate that we never were engaged in any concerted action with improper design.

The Court: If you desire to rely on these documents as evidence, even as somewhat in the nature of character evidence, I suggest that they be formally offered. If, however, the nature of the documents is such that the respondents feel that the Court may take judicial notice of them, there is perhaps no need to offer them formally.

Mr. Sacher: May I at this time offer, your Honor, the things that we have and reserve the right to introduce one or two documents in addition.

First I should like to offer in evidence the individual statement of Mr. Justice Frankfurter dated November 27, 1950.

The Court: That is a statement in what respect? What is the background of this statement? Where does it appear?

Mr. Sacher: Well, it is a slip-sheet opinion of Mr. Justice Frankfurter in the Dennis case on the occasion of the disposition of an application made for the introduction of additional counsel.

Mr. Adams: Of course I have no objection to it, your Honor.

The Court: Very well, let it be marked Exhibit 1. And it is offered in behalf of both respondents?

Mr. Sacher: Both respondents, your Honor.

Transcript of Hearing of December 21, 1950

The Court: Let the record so show.

(Marked Respondents' Exhibit 1.)

Mr. Sacher: I should like now to offer in evidence the first full paragraph of page 316 in a work entitled "Labor Relations In The New York Rapid Transit System," written by Father James J. McGinley and published by the Kings Crown Press.

Mr. Adams: Will your Honor bear with me a moment? (After examining) I do have to object to this, your Honor.

The Court: I didn't quite catch what it was. Will you state—

Mr. Adams: It is, if I may say, a statement in a book with reference to the character of one of the respondents, Sacher.

The Court: I suppose it is fundamental, isn't it, that character witnesses have to take the stand, be sworn, and subject themselves to cross examination. So that if this is offered as having the quality of evidence, I feel that I must sustain the objection.

Mr. Sacher: May I address your Honor briefly on that question?

The Court: Surely.

Mr. Sacher: It really isn't literally character evidence in that sense. It is not a testimonial to character as such, but it is an appraisal of my work as counsel for the Transport Workers Union in the City of New York and throughout the country, and I wish to rely on it in part to indicate that by the service there rendered and the manner of its rendition that far from alienating people from the courts and from the bar, that that conduct and that service contributed to an understanding by the people of the functioning of the courts and a sympathetic consideration of the bar as well as the courts. That is the purpose of it.

Transcript of Hearing of December 21, 1950

The Court: The witness I think is unexceptional and my indicated ruling was based not at all on the belief that the material was irrelevant or immaterial; it was based rather on its incompetency. It was rather brought to the attention of the Court and offered in such a way as to be beyond the historic safeguard of cross-examination. If respondents have character witnesses that they wish to offer certainly the Court will hear them.

Mr. Sacher: Thank you.

Mr. Isserman: If the Court please, before Mr. Adams proceeds, without necessarily making any hard and fast arrangements in respect to it, may we have some idea as to the time which will be taken or the time the Court will allow for the respective arguments, if the Court deems that desirable at this point?

The Court: In a proceeding such as this the Court should be deterred from using the methods of Procrustes. Remember the activities of that classic gentleman who when guests came to his home fitted them to the bed either by amputation or stretching them out.

I think the present hearing is of such a nature that the Court should adjust itself to the needs of the parties rather than yielding to other public pressures which often require that the parties shall adjust themselves to the available time of the Court. I suggest that that is an unrestricted invitation or an expression of desire to give the respondents every opportunity to present a proper defense to the pending petition.

I had hoped, and rather expected, that the proceedings would be concluded today. But I, at this juncture at least, will set no rigid time limitations.

Mr. Adams: I may say, your Honor, that I certainly hope to conclude what I have to say on this aspect of it

Transcript of Hearing of December 21, 1950

certainly within the hour, and I understand that I will have an opportunity later on to reply.

The Court: That is correct.

Well, is there any farther offer from the respondents?

Mr. Isserman: There is not, your Honor.

The Court: May it then be definitely understood that the record of fact is closed?

Mr. Sacher: Yes, your Honor.

Mr. Adams: On our part also, your Honor.

Mr. Sacher: Will your Honor consider any briefs or arguments made either in the Court of Appeals or in the Supreme Court as falling within the scope of evidence or will you take judicial notice of them?

The Court: I am not sure that I understood the question. When it comes to final submission I will defer to the wishes of counsel and receive oral arguments or written arguments or both. Is that what you are asking?

Mr. Sacher: No, I haven't made myself clear.

There are certain briefs we would like to lay before you, the briefs that we filed in the Supreme Court in the main case, and we should also perhaps like to file with your Honor copies of the arguments we made in the Supreme Court, and I am inquiring as to whether you would regard those as evidence so that we ought to reserve for the moment the question of submission of those or whether you will take judicial notice of them and receive them as not necessarily evidence in the case.

The Court: I don't know of course for what you will offer them, Mr. Sacher: If you should claim that they have the effect of evidence on the issues here, why, I think they should be offered as evidence. But if you claim they are submitted merely by way of argument and wish to expand your summations here by referring—incorporating them by reference, so to speak, that will be entirely satisfactory.

Transcript of Hearing of December 21, 1950

Mr. Sacher: May I reserve an opportunity to make an offer of the brief which we do not have here?

The Court: Very well.

Mr. Sacher: Thank you.

The Court: With that reservation on record, is the record of facts closed?

Mr. Sacher: Yes, your Honor.

Mr. Adams: I may say we take it, your Honor, in a proceeding of this character this Court may look at any of its own records. In that respect I should think that anything to which—

The Court: May look at them, Mr. Adams, for certain purposes. But I don't understand that records made in other proceedings against other parties where the issues are not precisely those here are directly admissible on the issues raised in the pending proceedings.

Mr. Adams: I should agree probably not as evidence of facts; however, we can cross that bridge, I suppose, when this brief, or whatever it is, is offered.

The Court: Yes.

Well, I think, then, we have the record of facts in such shape that I leave you to continue.

Mr. Adams: Well, I am extremely grateful to your Honor for interrupting me and also extremely relieved that my notion of the way to proceed turns out to be the right way.

I was at a point, your Honor, where I was discussing this concerted action and I had referred to the fact that despite loud complaint that respondents were entitled to and indeed must have a hearing on this issue, when given an opportunity for a hearing they admit the facts. That conclusion is reinforced by what the respondents have just said, that this record except for some brief in the Supreme Court is closed on the facts.

Transcript of Hearing of December 31, 1959

I should like, therefore, now to turn to another aspect of the evidence which we say shows with equal force the common design of these respondents and their colleagues. The means that they used to effect the plan shows the working out of the plan itself.

In the petition in paragraph 14, and following a to m, you have a number of specific kinds of conduct, all of which are admitted. Those kinds of conduct are divided roughly into two classes. The first was one in which they in effect tried to effectuate the purpose of delay and obstruction. That would include in our views the kinds of conduct indicated in subparagraph a. They disregarded the numerous warnings of the Court concerning their wilful delaying tactics, and it would include d, insisted on objecting one after another to rulings of the Court, despite the rulings of the Court that all objections were for the benefit of each defendant, and subparagraph e, persisted in making long, repetitious, and unsubstantial arguments, and objections, working in shifts, abouting, cheering, snickering, all admitted. These are all along the same line. Another one, f, urging one another on to badger the Court. Another one would be i, disregarding the orders of the Court, arguing without permission, and j, disregarding rulings on admissibility with the idea of getting something before the jury that they knew should not be before the jury.

The second has to do with the attacks on the integrity of the Court itself. That would include subparagraph b, suggesting that findings and conduct of the Court were for the benefit of newspaper headlines, and c, insinuating that there was connivance between the Court and the United States Attorney; g, making direct charge of bias, prejudice, corruption and partiality against this Court; h, making a succession of disrespectful, insolent, sarcastic

Transcript of Hearing of December 31, 1950

remarks, asking questions under k, knowing that objections would be sustained and endeavoring to create a false picture of bias and partiality upon the part of the Court; accusing this Court of racial prejudice, under l and m, conducting themselves generally in a provocative manner.

We have set forth in the petition, may it please the Court, a vast number of specific instances of that kind of conduct which was engaged in by all of the respondents and their colleagues. We say that that kind of persistent, systematic conduct, day after day through the weary months of the trial, was a calculated, deliberate plan and that it cannot be found otherwise.

Now, when you consider that, the record of this Court shows, and the record before your Honor shows, that these respondents had ample time to get this case ready, this Dennis case. Judge Medina so found. They applied for a number of delays; they were granted more than ample time to prepare this case even though it was a large case.

As I referred before, their conduct with respect to delay began long before the trial, and I referred before to this question of the jury challenge. They filed that on November 12th, and then they got an adjournment, and then they withdrew it.

Now, they could have determined this whole jury challenge question way back there in November as the orderly administration of justice required, but they withdrew it.

Then finally the case was brought on and they filed this challenge to the entire jury.

Now, we do not in any way suggest, your Honor, that these respondents and their clients did not have a complete legal right, and if they were so advised, a duty to challenge this jury. That is not the position of the petitioners. We agree that they had the right. But we say that they misused that right, and that they misused their other rights

Transcript of Hearing of December 21, 1950

in the course of the jury challenge trial and, of course, in the course of the main trial.

Now, the conduct of the respondents and their colleagues began to emerge almost as soon as the jury challenge proceedings began, and within a week and a half Judge Medina could see what was going on here. And right within a week and a half he said that it was beginning to appear that there were a series of maneuvers on the part of counsel for delay.

Now, there was the trial judge who saw what was going on and he pointed out to counsel within a week and a half.

Then he went on again and again, February 10th, February 11th, February 18th, February 25th, February 28th, time after time after time, the Court pointed to the obstructive tactics of counsel.

The Court: What effect do you think I should give to that?

Mr. Adams: The mere fact that the Court pointed to this obstructive conduct in itself does not prove my point, but the conduct of counsel in the face of those repeated admonitions and warnings, we say, is significant. That is our basic point there. I am just giving your Honor now the background of it.

And it came to a point where on February 28th—and I shall not now, your Honor, refer to specific pages; we will eventually file a brief, but all of the statements I now make are based on record references—on February 28th the Court found specifically that there had been wilful, deliberate and concerted effort to delay the proceedings.

That finding, we say, is explicitly, completely authenticated by the record, which shows on literally hundreds of occasions conduct by each of these respondents, by their colleagues, which gave basis for that finding—

Transcript of Hearing of December 21, 1930

The Court: At what stage was that finding made?

Mr. Adams: That particular finding, your Honor, was made on February 28th. The finding was made again and again, on April 4th—

The Court: As I understand you, you deem it of importance only for the light it sheds on the respondents' subsequent conduct?

Mr. Adams: I think it bears on the question of wilfulness, in the first place; and, in the second place, I think it bears on proof of a joint design. Where a court indicates that in its view there is concerted action for delay and a series of maneuvers for delay based on certain kinds of conduct, and where counsel persists thereafter time and time again in that same kind of conduct, in the face of similar warnings—we say that that shows a calculated intent to disregard the rulings and to engage in a concerted plan to accomplish something wrongful.

Now, at the end of the trial in connection with the jury challenge the Court made an express finding when he filed his findings of fact and conclusions of law which is quoted in paragraph 10 of the petition, and to which I shall refer later.

Now, I would like, if I may, to give you some slight impression without trespassing too much on the Court's time, as to how this was done. In one instance we have—well, I think perhaps if I took this particular one—the respondent Sacher objects to a question, and the Court—

Mr. Isserman: We would like to follow it if Mr. Adams could give us the reference.

Mr. Adams: Well, I do not see the record reference here.

Mr. Isserman: Well, it is all right then. We thought you had it, but it does not matter.

Transcript of Hearing of December 21, 1950

Mr. Adams: I will summarize this one, your Honor, because I do not want this to take too much time by saying this, that by instance after instance—I could repeat this indefinitely all day—we show one lawyer getting up and making an objection after the Court has previously ruled that such an objection should not be made; then somebody else joins in and then somebody else joins in.

Now, I want to call to your attention at this point to the fact that the Court ruled that objections were for the benefit of all defendants. When one lawyer objected, that was for the benefit of all. It was completely, persistently and flagrantly disregarded throughout the entire trial, and there was nothing the Court could do to stop it.

And another phase of this is that the Court ruled finally on February 25th during the challenge proceeding that it would hear no argument on motions or objections without permission. Despite that it was flagrantly, persistently disregarded by all of the respondents, not just by one or two, not on just one or two instances, but on that particular admonition we have pointed to in the petition alone, that particular direction of the Court was disregarded on 75 specific occasions.

Now, we say that that kind of conduct after the repeated warnings and admonitions of the Court, in view of the Court's rulings, is the kind of conduct which shows without any question that it was a calculated effort, a concerted effort, on the part of these respondents. But that is only one branch of it.

We come now to the joint attack of these lawyers on the integrity of this Court.

Mr. McCabe—and I am going to read this one, if I may—and this is in the petition at paragraph XV, it is

Transcript of Hearing of December 21, 1950

referred to in the petition, and I think, your Honor, that the record reference is Volume 3, 2097, but it is not set out in the petition—

The Court: I still can't find my way around in this record, Mr. Adams. Volume 3 seems not to cover that. Did you say 2097?

Mr. Adams: Yes.

The Court: Oh, yes, I have it.

Mr. Adams: I direct your Honor's attention to that first statement of Mr. McCabe on that page where he says— I do not need to read it if your Honor has it before you. But for the record I may say that there Mr. McCabe says:

“I would like to say to your Honor”—

The Court: Who is Mr. McCabe?

Mr. Adams: He is one of the counsel, one of the co-counsel, with the respondents in this case.

“Mr. McCabe: I would like to say to your Honor that I have really come to believe that the constant repetition by your Honor at intervals which are almost as regular as the tolling of Big Ben—and I mean nothing personal in the allusion—or the eruption of Old Faithful out in Yellowstone Park, or wherever it is, these come at stated periods. I think you can pick 11.20 and 3.20 when these statements come that we are delaying, we are doing nothing.”

The Court says: “What is the point of those times?

“Mr. McCabe: 11.30 I think is the deadline for the afternoon papers, your Honor, and I think around 3.20 is the deadline”

and so on. A direct charge.

Transcript of Hearing of December 21, 1950

The Court: Well, Mr. Adams, Mr. McCabe is not a party here.

Mr. Adams: Mr. McCabe is not a party here. Therefore I ask your Honor to look at the charge in paragraph 15, sub-paragraph V, of the petition, in which you have the respondent Sacher in exactly the same kind of conduct, even worse.

The Court: What page in the printed petition?

Mr. Adams: It is on page 14, sub-paragraph V.

Sacher says:

"But you have characterized my conduct as well as that of trial counsel, and I wish to deny it on the record, and I wish to say that your Honor was aware of the fact that there are 40 or 50 newspapers here, and on the threshold of Congressman Marcantonio's testimony you have taken occasion to say that his testimony is being introduced for the purpose of dragging and delaying the trial";

and so on.

What I am talking about now, your Honor, is the joint attack on the integrity of the Court. I have given you one instance of that particular type of conduct. Please, in my giving you the particular instances, do not think that they are the only instances. They are all in the record, but I am here trying to pick out examples of conduct, because if I tried to conduct this argument otherwise, I would in effect have to go through page after page after page. So I simply want your Honor to understand at this point what I am trying to do is pick out specific examples which will be many times repeated in the record. So when I pick out McCabe's conduct and Sacher's conduct, we feel we can in each instance point to other similar situations on which we rely in showing this concerted action.

Transcript of Hearing of December 21, 1950

There are one or two other examples of this kind of attack on the integrity of the Court. McCabe says at page 1669:

"The way this case has been conducted is one which I certainly hoped I would never see in a court of justice.

The Court: You mean the way it has been conducted by me?

Mr. McCabe: I mean that exactly."

Then you have Gladstein saying:

"But, your Honor, upon the pretext that this is a confidential document"—

and so on, and the Court sustains an objection. Then you have Sacher—

Mr. Sacher: May we have the dates of those?

Mr. Adams: That was at record 3R284. There are in all some 80 instances of that kind of conduct, conduct in which there was an effort to impugn the integrity and honor of the Court and to provoke the Court into some kind of an intemperate remark.

May I leave it with just this one. Sacher says, when an objection is made:

"We are trying to prove the truth here and we are being estopped from proving the truth; that is what is happening."

As I say, I could continue along this line. I have tried to pick out simply one or two instances indicating to your Honor the kind of conduct to which I refer, and I suppose unfortunately the burden will fall upon your Honor of looking at these other instances and determining whether or not they justify the assertion we make with respect to them.

Transcript of Hearing of December 21, 1950

I do not think I should trespass on your Honor's time to repeat indefinitely this kind of example.

I should, however, like to refer to the views of the Court, particularly the Circuit Court, with respect to this kind of conduct. Judge Augustus Hand said:

"The record appears to justify the findings"—

The Court: I think there is a danger of confusion there. Is it not so that Judge Hand may have been speaking on a different record? After all, this is a court of first instance and we have our own record here now, and I think, although the task is onerous, it is a matter for my independent judgment.

Mr. Adams: I quite agree, your Honor. However, I should not have presumed to refer to Judge Hand's opinion on this subject, except for the fact that this entire record, the one we are now referring to, was the one that was before the Court when Judge Hand was writing the opinion from which I was about to quote. The appeal from the contempt conviction, bearing in mind that the contempt conviction was based on the entire record as this proceeding was, went up to the Court of Appeals on that record, and while I do not believe the entire record was physically printed, the parties put before the Court such parts as they desired. So that I feel, if I may say so, justified in referring to the views of the Court, which looked at this particular aspect of the case, as being of some guide to us in considering the conclusions.

The Court: If you seriously urge it, I will give it consideration, but I have in mind that necessarily the issues here and the test here are not the precise issues to be determined by the same test as those involved in the contempt case.

Transcript of Hearing of December 21, 1950

Mr. Adams: The standards may not be quite as high here as they are in the contempt case in the sense of burden of proof. However, I think it important, and it has just been called to my attention, that the entire typewritten record in this case was before the Court of Appeals when they rendered their opinion in the contempt case. The six Circuit Court Judges have passed on this record. Judge Medina has passed on it. In the contempt case the three Circuit Court judges, on the issues that we are presently discussing, found that there was, to use Judge Frank's language, powerful evidence of the concerted action. I think that where those three judges in that Court and three judges in the other case come to that conclusion, I am justified—in fact, have a duty—in presenting those opinions to this Court for such guidance and consideration as the Court may wish to give them.

I should hasten to say that I do not in any sense suggest that the conclusions reached by any of the judges in any of those opinions are in any way binding on your Honor, but I do say that they provide an important, serious guide for us in considering the conduct of these respondents and in particular on this point.

I will pass from that now but refer again to the fact that Judge Learned Hand found:

“All that was done that could contribute to make impossible an orderly and speedy dispatch of the case; and whether this was as the Judge found because of a deliberate and concerted effort to wear him down there can be no doubt that such a concert can be in precisely the same form.”

That phase of the case, which has to do with the concerted plan on the part of all these respondents, I should like to summarize by saying: First, it is admitted. Second,

Transcript of Hearing of December 21, 1950

the conduct throughout the trial in the hundreds of instances which we have cited shows, in the face of the repeated directions of the Court and the effort of the Court to control the case, a systematic design. The references, the examples, which we have given to your Honor, we say are repeated many, many times in the record itself; and from those facts, the only fair inference that can be drawn, particularly in the absence of any challenge by the respondents, is that there was a concerted plan of action.

I will now turn, if I may—I wonder if your Honor would forgive me if I asked for a five-minute recess.

The Court: We will take our mid-morning recess at this point, a ten-minute recess.

(Short recess.)

Mr. Adams: May it please the Court, my colleagues have called to my attention that perhaps I haven't made it quite clear about the nature of the references, the stenographic minutes.

The Court: I think I have that clear.

Mr. Adams: You think you have that clear?

The Court: Yes.

Mr. Adams: I wasn't sure I made it clear.

Now I should like to refer, if I may, to the kind of conduct which was separate from the conduct constituting the concerted plan, the specific instances of misconduct by the respondents who are now before the Court.

The Court, I may state, throughout the proceeding made every effort to control the conduct of counsel. On at least 35 occasions throughout the record we find particular instances of the Court trying to compel these lawyers to behave, trying to compel them to act within the bounds of their oaths of office, but that was completely disregarded.

Transcript of Hearing of December 21, 1950

Now from the very beginning of this case we find on the part of Sacher a series of incidents, almost anyone of which, in our view, standing alone, quite apart from the concerted plan, would be sufficient to warrant his disbarment.

On January 3rd before the trial even opened, on a routine motion for physical examination—and this is referred to in the petition on page 12—Sacher starts right off before Judge Ryan of this court and says:

“We want to be in a position where we at all times are given the fullest constitutional opportunity to defend the rights and interests of our clients.”

The Court held:

“You don’t have to be put in that position. You are in that position.

“Mr. Sacher: We are not.”

Then another effort, another instance on the part of Sacher, and here again, may it please the Court, I am only referring to some of these incidents because I simply want to highlight them here.

But here is another one in the petition, IV, on page 13:

There was an objection and then there was a reconsideration and finally the Court ruled again, and Sacher said:

“I repeat, this is an Alice in Wonderland procedure. We always get the sentence first and then the trial. Now if we could just get back to ordinary procedure with the trial first and sentence afterwards,”—

Now that was said to a judge of this court by an officer of this court.

Transcript of Hearing of December 31, 1950

The Court told Sacher to refrain but he went on almost immediately and then he says:

"Is it because the evidence is becoming too devastating for the Government that we must now be circumscribed? This is the telling stuff. Why are we stopped at this point when we proceed definitely to show that the Republican Party vote is the guide to the determination of how many jurors come from a district, and not that impartial selection which the Constitution and the statute require? That is what is at stake in this instance, your Honor, and I submit I don't want to take any more of your time if we are doing nothing to influence you; I don't want to be like the Yankee in King Arthur's Court—"

and so on.

Another time he says to the Court:

"Let us see whether I get equal treatment with Mr. McGohey, the United States Attorney in this case."

And in another instance he says:

"We are trying to prove the truth here and we are being estopped from proving the truth. That is what is happening."

Another time he says:

"I have no desire to address a Judge who won't listen."

Another time he says: "May I say to your Honor that I think your Honor's statements simply mean that advocacy no longer has a place in our courts."

Transcript of Hearing of December 21, 1950

Those are just a few of the things that were done by this lawyer in this court.

But I want to refer again, if I may, your Honor, to the June 3rd incident where these lawyers themselves actively, personally, participated in an attempt to intimidate this court, and who beyond that in disregard of every requirement of the Canons of Ethics, of proper conduct in the courtroom made no effort to control their clients in a disorderly incident in the presence of the Court but, on the contrary, joined in with them. What they did was abdicate their function as lawyers; they identified themselves completely with the cause of their clients, forgetting that it is the highest duty of a lawyer to so comport himself that he may control his clients in anything which might possibly affect the integrity or the dignity of the Court.

Now, those were just some of the things that were done by Sacher in this case. We have put in here I don't know how many instances of this kind of conduct, and, your Honor, as I say, has the burden of looking at this record; but I should like to call to your attention here that this kind of conduct by Sacher included these things: he disregarded the warnings of the Court; delayed the trial; argued without permission; refused to desist from argument; improperly interrupted the Court and counsel; asked improper questions; made insolent, sarcastic, impertinent and disrespectful remarks to the Court; shouted, sneered, snickered.

Now, all of that, your Honor, you might say, "Well, a man in the course of a trial, his emotions become involved and he says things and he does things that he does not mean."

But we say, your Honor, that where you find that kind of a persistent course of conduct you may not overlook

Transcript of Hearing of December 21, 1950

it; and we say, in addition, that you have beyond that the specific instances any one of which standing alone is sufficient to warrant action by this Court.

The same is true of Isserman. His conduct perhaps was more subtly designed to offend the Canons of Ethics, but he succeeded even better. I refer particularly—and I think one instance would do with respect to the respondent Isserman. In the petition we have set this out, but if I may, I should like to endeavor to translate for the Court what happened here. There was a witness on the stand—

Mr. Isserman: Pardon me, could we get the reference, if you please?

Mr. Adams: Yes, surely. It is set out in full at paragraph 17, II of the petition at page 33 of the petition.

In that instance the Court asked the witness a question—this is the Court, not one of the lawyers—and Isserman objected and he was overruled. The Court told the witness to answer. Gladstein objects to the Court's tone. The Court had to tell him to sit down. The Court had to get the marshal. Then Gladstein objects. Then Isserman objects. Then he had to tell Gladstein to sit down. Then Isserman objects. Then the Court tries again to get an answer from the witness. Then Isserman gets up and asks if he could ask a question, and the Court tells him he may not. He then objects to the Court's question. He is overruled again, and the Court repeats the question. Isserman objects and is overruled again. Then Gladstein objects and is overruled. And the Court once more tries to get the witness to answer, and Isserman objects again; and the Court reforms the question, and Isserman objects again; and then they had to get the marshal again to make him sit down, and then he continues to object, and then he objects again, and they get the marshal again, and the

Transcript of Hearing of December 21, 1950

Court finally has to refer to the contemptuous conduct, and despite all that Isserman objects again, and finally the Court, in despair, gives up, and the counsel have successfully prevented the Court from pursuing its function and asking and getting an answer from a witness.

Now, that particular conduct repeated again and again throughout the trial seems to us to indicate the same kind of conduct on the part of Isserman which warrants his disbarment as much as the other evidence warrants the disbarment of Sacher.

This too, was commented upon on these precise facts, Judge, by the Circuit Court of Appeal. Judge Augustus Hand characterizes this as outrageous and as preventing an orderly trial. He says again that Isserman with the support of Gladstein succeeded in blocking the inquiry.

Judge Frank says that the Judge attempted to obtain from a defense witness an answer to a single, simple question; two of the defense lawyers so frequently and persistently interrupted that the Judge, worn out and in despair, gave up the attempt, and the question went unanswered. The judge would have been a superman had that almost unexampled misconduct not so raised his blood pressure as to rob him of the capacity, at or about that time, to deal calmly with the contempt.

Those are the characterizations of the courts who have already passed on this, and they give weight, your Honor, to the petitioners being in court this morning and in bringing this petition before you.

Again with respect to Isserman I call your Honor's attention to the fact that he too throughout the entire trial also disregarded the warnings of the court, objected improperly, conducted himself in an insolent, sarcastic, sneering way throughout the entire trial.

Transcript of Hearing of December 21, 1950

There again I unhappily have to place the burden on your Honor of looking at these particular instances, because it would unduly prolong it to refer again and again to these matters. I have tried simply to point to the highlights as a focus in my argument of the kind of argument we rely upon.

Now, so much for the kind of evidence that is before the Court.

I think perhaps I should turn now to the law which has to do with the conduct of these petitioners. First I have dealt already with this question of concerted action, and I have indicated the nature of the rules that have to be applied in trying to find out whether concerted action took place. I do not think it is necessary for me to go over that again.

With respect to the conduct the judges—and if I may refer to that again—Judge Learned Hand has characterized their conduct, and he indicates that the question of their misbehavior and his misconduct cannot be entirely separated; and it is not irrelevant that this court decided that they so far exceeded the bounds of professional propriety as to deserve a sentence for criminal contempt.

He goes on to say: "Early in the trial the Judge ruled that the objection of one defendant might stand for all; yet the record is filled with repetitions by all, or most of, the attorneys of substantially the same arguments made by the first one; and these were repeated incessantly on later occasions after the point had been decided. All was done that could contribute to make impossible an orderly and speedy dispatch of the case."

Judge Augustus Hand says that the Judge saw and heard the appellants deliberately delaying the trial disregarding his orders and accusing him of wrongdoing and corruption.

Transcript of Hearing of December 21, 1950

Judge Frank says: "We affirm the orders punishing these lawyers not because they courageously defended their clients, or because those clients were Communists, but only because of the lawyers' outrageous conduct—conduct of a kind which no lawyer owes his client, which cannot ever be justified, and which was never employed by those advocates, for minorities or for the unpopular, whose courage has made lawyering proud. The acts of the lawyers for the defendants in this trial can make no sensible man proud.

"What they did was like assaulting the pilot of an airplane in flight, or turning out the lights during a surgical operation. To use homelier words, they tried to throw a wrench in the machinery of justice.

"The basis of our decision is as simple as that."

And Judge Clark said: "To one schooled in Anglo-Saxon traditions of legal dogma, the resistance pressed by these appellants on various occasions to the rulings of the trial judge, necessarily appears abominable."

Now, so much for what our own courts think. Let us examine again in the light of the independent standard which your Honor must consider quite apart from what other judges may have thought of this kind of conduct. They were guilty, we say, in the main of two kinds of conduct: One was obstructing justice, and the second was in attacking the integrity of the court.

Now, the canons of ethics, which I need not repeat in full, which are before your Honor, definitely deal with those problems. I should like to emphasize, however, that it may not be said by these respondents that they were justified in any conduct by reason of the conduct of the court.

Now, let me hasten to say, Judge, before any possible wrong inference could be raised from what I have said,

Transcript of Hearing of December 21, 1950

that in my judgment no one could possibly have conducted this trial more fairly than Judge Medina did, under the most extreme provocation, but nonetheless these respondents would probably like to have us believe that this conduct was in some way justified by the conduct of the Court.

I say to your Honor—and the law sustains, I believe, my position—that no matter how corrupt, how biased, how prejudiced the court might be, no lawyer is justified in departing by one iota from the highest standards of his professional duty.

In fact, the degree of his duty rises even higher under those circumstances because then he is the officer of the court charged with maintaining the court's own integrity, and it is unnecessary in this or in any other case for lawyers to say, "Well, I did that because the Judge egged me on," or "because the Judge was corrupt or not impartial."

But let me emphasize again, so that there may be no mistake, that Judge Medina's conduct in this case, as the Courts have repeatedly found in this case, was without exception representative of the finest kind of discharge of the judicial function.

Now, these lawyers have done all these things. They have been disrespectful—and that is provided for in the canons of ethics, and it does not seem that it is necessary even to mention it—in connection with the integrity of the Court which I have just referred to; they have not only attacked the court directly but have done it by innuendo and have failed completely to recognize their duty that if they had a complaint against the court, there is a legal way to proceed, and they did not use any legal method of proceeding. What they did was to attack the court's integrity directly and in the courtroom. And lest there be

Transcript of Hearing of December 21, 1950

any misunderstanding about this, we do not challenge their right to file a challenge to the jury or to take any legal step in the proceeding. We say they must do it properly and in accordance with the requirements of a lawyer's obligation. This they did not do.

Now, there are many cases which deal with this problem. It is unnecessary, I am sure, for me to refer to it again and again, but I do think that I should refer perhaps specifically to one of the canons of ethics which the respondents have seen fit to quote in their own answer. It has to do with the duty of a lawyer about how far he may go in supporting his cause. Now, the canon provides that:

"The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client."

So we say that in this case, your Honor, as I indicated before, there was a complete disregard of the duty of the

Transcript of Hearing of December 21, 1950

lawyers, as lawyers; and there was a complete identification and absolute identification with the cause of the clients and with the clients themselves, so that there was no separation between the aims, the purposes of these men charged with crime and with their lawyers.

It went far beyond any question of professional representation, but it meant that they themselves had accepted the position of their clients, and in accepting it had completely disregarded their duty as lawyers. That is one of the basic charges, may it please the Court, in this whole proceeding.

Now, I would think that when we consider the question of applying these standards, your Honor, we must consider this, first, that this is a civil proceeding; it is entirely separate and different from the contempt proceeding. The burden of proof here is less than in a contempt proceeding, which is a criminal proceeding. However, the same acts which constitute contempt may, and in this case we say do constitute evidence requiring disbarment. We say that in a disbarment proceeding the lawyer has a duty of justifying his conduct. We say that it has not been done here. We say that on the contrary these respondents have engaged in what Mr. Justice Jackson calls a disorderly, obstructive, contemptuous or defied demonstration within the courtroom, and, as he points out, "But the more subtle danger is from the growing attitude that the judicial control of the proceedings is a sort of tyranny, that a courtroom ought to be a cockpit without rules, the trial a free-for-all, into which the participants are free to throw anything they please." And we say that that is what happened in this case, and that is what we denounce.

Now, I must touch, your Honor, upon the answer. I have previously indicated that it admits all of the facts, and that it admits, moreover, that there was a concerted

Transcript of Hearing of December 21, 1950

effort here, a deliberate and concerted effort. But the answer is interesting in this respect, as I hope to be able to demonstrate to your Honor.

The position of these defendants as indicated in their answer, pursued to its logical conclusion, in our view, is that any kind of conduct—subornation of perjury, bribery, corruption, tampering with juries—any kind of conduct is justifiable so long as you commit the acts under the guise of exercising a legal right. I think there can be no escape from that logical conclusion in this answer.

Now what have they done? They have not at any point attempted to justify their conduct as such. They have made no denial of these disgraceful acts. They say, "We did all that. There is no question about it." But they proceed first on a false assumption. They say this was an important case, that they were justified in taking legal steps, that there was, they claim, bias, prejudice, hostility, hysteria, that they had to present all those positions to the Court, and that public opinion justified them in doing so, and therefore they had to go forward.

Now they say quite wrongfully that this proceeding is essentially based on their conduct with reference to the jury challenge and their conduct with reference to motions for mistrial, for continuance.

No such thing. The charge in this case is based on their conduct throughout this whole record and it is based upon their misuse, misuse of legal rights in behalf of their clients.

So that they take their first false assumptions in the answer and then they argue throughout the whole answer that everything they did was justified because they were asserting a legal right. We repeat again that we do not challenge their right to do anything they wanted to defend

Transcript of Hearing of December 21, 1950

their clients lawfully, but we say that they did it unlawfully.

Now they refer to the finding of the Court at the end of the jury challenge in which the Court found—and that is in the petition, and they say this is one of the main props of the proceeding, which it is not—they say that the Court then found that counsel have participated in a wilful, deliberate and concerted effort to delay the trial by making the challenge to the jury and by including in the challenge extravagant charges of discrimination against a multitude of minority groups, which they must have known were unfounded; and that in the lengthy trial of the jury challenge they, acting in concert, wilfully engaged in grossly improper tactics for the purpose of obtaining further delay and for the purpose of bringing the administration of justice in this court into disrepute. They say that that is one of the main props of the proceeding. It is not. It is a finding of the trial court which may be of some guidance to this Court. This Court will make its own independent findings.

But it is interesting to see that they seize upon the first aspect of that finding in which the judge found that they delayed the trial by filing the jury challenge and that they had no business doing so. They say, "That isn't true at all; we had every right to do it." They say, "Look at Judge Hand's opinion in the Circuit Court. He wrote a 20-page opinion. You would think from the way they cite the opinion that he decided in their favor. Actually, if you read Judge Hand's opinion, he says their challenge to the jury was wholly insubstantial. What they omit in the discussion in this answer is Judge Medina's further finding that in the trial of the jury challenge they acted in concert and wilfully engaged in grossly improper tactics

Transcript of Hearing of December 21, 1950

for the purpose of obtaining further delay and for the purpose of bringing the administration of justice in this court into disrepute.

They make no mention of that in their answer and they do not defend themselves against that finding of the Court.

They also say that they did not delay, and on that we rest on the record. There is no need of my repeating all of that here.

They say that the indictment was vague. What of it? The question is, how did they defend their clients? Did they act as honorable lawyers or didn't they? How many legal defenses they may have had did not have anything to do with this case.

They also say that their professional impropriety was adequately dealt with by their convictions in the contempt case. I should like to emphasize here, your Honor, that the purpose of this proceeding, as Judge Knox and so many other judges have pointed out, is to purify the bar. The purpose here is to determine whether men who have committed the acts that the petitioners say they have committed, and that they admit, are to continue as officers of this court and representatives of the public. That is the question here, not whether they have been punished and properly punished in a contempt case. That has nothing to do with the question which lies before your Honor. The question of the contempt conviction of course is before the Court, but it is not relied upon here as proving the facts. We rely upon the facts themselves.

They have also suggested in their answer that they had occasional lapses from the proper standards—occasional lapses. I don't know what occasional lapses are, but there are literally hundreds of instances to which we have specifically referred and as your Honor goes through the record, your Honor will find many more. These are not occa-

Transcript of Hearing of December 21, 1950

sional lapses. These are studied, deliberate, consistent, vicious attacks upon the Court and upon its integrity. I do not think, your Honor, that there is anything that can more fittingly show the conduct of these respondents in this case and their total disregard of even the most elementary principles of justice and decency than one instance.

On September 29, 1949, while arguing a motion at the end of the case, this occurred. Mr. Sacher speaking:

"Mr. Sacher: * * * They (the early Christians) did so many things, more than this evidence disclosed, that if Mr. McGohey were a contemporary of Jesus he would have Jesus in the dock.

"Mr. McGohey: Your Honor, I resent that.

"The Court: I don't blame you.

"Mr. McGohey: That is the most unconscionable thing I have ever heard, your Honor. I have been born and raised in this city. It is well known that I am a member of the Catholic Church. I firmly, with all my heart, believe that Jesus Christ is Divine, that he is the Son of God, and to have it said in this courtroom, where I am a member of the bar, that I would have persecuted my God is an insult that I can't resist interrupting for.

"The Court: Please refrain from any such reference again, Mr. Sacher. That was quite improper, and I don't blame Mr. McGohey at all for resenting it; anyone would.

"Mr. Sacher: I say to your Honor—

"The Court: It is a terrible thing to say.

"Mr. Sacher: I say to your Honor that the resort to so-called secrecy—

Transcript of Hearing of December 31, 1950

"The Court: You don't even apologize for it.

"Mr. Sacher: I am proceeding with my argument, your Honor. I have no apologies to make."

I will repeat it:

"I am proceeding with my argument, your Honor. I have no apologies to make."

That is this case, Judge.

The Court: Proceed. I might say at the outset, Mr. Sacher, that to accommodate counsel in another matter, I have fixed the beginning of our mid-day recess at 12.45.

Mr. Sacher: Thank you. May it please the Court, I must confess that it comes with something of a shock to hear it said today that paragraph 10 of the petition, which contains this finding of Judge Medina's in his disposition of the jury challenge, does not constitute one of the petitioner's main props in this proceeding. Certainly, judging by the dignity of the position that was accorded to that finding in the petition, we were warranted in assuming that it was intended as an important allegation. While it is true that Mr. Adams has renounced that allegation as having any significance beyond the advice or assistance that it might give to this Court, the fact is he took occasion to make the observation that our answer had not made any reference to the second part of paragraph 10, that is the second sentence which alleges that the counsel for the defense for the further purpose of achieving delay adopted tactics in the trial of the challenge which were designed to achieve that delay and to obstruct the administration of justice.

The Court: I apparently don't understand your reference to paragraph 10. Paragraph 10 and what?

Transcript of Hearing of December 21, 1950

Mr. Sacher: That is in the petition, your Honor.

The Court: You mean—

Mr. Sacher: The petition in this case.

The Court: You mean in the affidavit in support of it?

Mr. Sacher: That is right. That is Mr. Adams' affidavit.

The Court: Findings of fact and conclusions—

Mr. Sacher: That is right.

The Court: Oh, yes, thank you.

Mr. Sacher: I make opening reference to this fact because I think one thing ought to be clear here, and that is that this petition and its accompanying affidavit were prepared prior to any of the adjudications made in the Court of Appeals either in the main case, which is *United States v. Dennis*, or in the contempt case, which is entitled *United States v. Sacher et al.* I mention it because I believe that perhaps there has come the realization to the petitioners that what they once thought was a powerful prop to support their position has in the light of the decision of the Court of Appeals in the main case persuaded them that it no longer possesses that value.

Be that as it may, your Honor, I think that it is valuable to approach this disbarment proceeding via paragraph 10, because when we do we will find that much of the generalization that permeates the petitioner's discussion concerning conspiracy will be dissipated when we move relentlessly from item to item cited in the petition or in the affidavit to support the concept of a conspiracy.

I think it is important that we should throughout bear in mind that there are two categories of charges here; the first category consisting of what is in paragraph 10 and paragraph 14 of this affidavit, the burden of which is that defense counsel conspired for the nefarious purposes de-

Transcript of Hearing of December 31, 1950

scribed in paragraphs 13 and 14, and the second half of the charges made consists of the so-called individual acts of alleged misconduct which, I take it, it is asserted would, apart from conspiracy, constitute such professional misconduct as to require the purification of the bar by our banishment from it.

I should like, if I may, to do what counsel for the petitioner has not done, to move from item to item and to see whether those items which are alleged to support an inference of conspiracy actually support it, because if there is one thing with which we lawyers have been damned throughout this case—and I mean throughout the main case down to date—it is with generalizations which are never pinned down.

If I may just for a moment make this observation, counsel for the petitioner thinks it is important to make the observation that we filed an answer which enables us to dispose of this important case within a fairly short compass. On the other hand, Judge Frank in his opinion in the contempt case indicated that a trial of the conspiracy count in Judge Medina's contempt certificate might entail a long drawn-out process because there might be the possibility that each and every little factual item alleged would be disputed, and we would go on ad infinitum to determine whether somebody had coughed at a given time or smiled or had done something else. So we have come into this court with a view to helping to a speedy determination of the important questions, and something is made of that.

I refer to it because it seems to me that in the last two years we have borne much havoc, and the kindlier thing to do would, it seems to me, be to spare us at least the unnecessary havoc. If we have offended as the petitioners assert we have, then all that havoc is our due and we shall

Transcript of Hearing of December 21, 1950

have to bear it as the price which justice exacts from the transgressor. But if we have not transgressed to the point which the petitioners assert, then I respectfully submit that it is an injustice to belabor us with things which are not only unexceptionable but which contribute to the due and proper administration of justice in this very proceeding.

The answer which we filed was, as I think your Honor observed on the last occasion when we appeared before your Honor, something in the nature of a demurrer. We did not raise issues of fact concerning what was contained in the record. Whatever is contained in the record is there, and there is no dispute as to its correctness. The dispute, however, was one which I think your Honor again referred to as a possible one, namely, a dispute that might arise concerning the proper inferences to be drawn from the facts in the record. I think in view of Mr. Adams' observations concerning the character of our answer, we ought to have it clear here, so that we are not put in a position where through some legal technicality we have forfeited a lifetime of effort, that it was not our intention to admit the words which constitute the subparagraphs of paragraph 14. In other words, when, for instance, paragraph 14a alleges that counsel disregarded numerous warnings of the Court concerning their wilful delaying tactics except for ironical references thereto—that appears on page 7, your Honor, of the document you hold in your hand—we did not intend to admit that that is what we did. All we intended to admit was—

The Court: Where does your response to that appear in your answer?

Mr. Sacher: You mean to these paragraphs, your Honor?

Transcript of Hearing of December 21, 1950

The Court: You are speaking of what you intended to admit with respect to paragraph 14. I should like to see the words of your admission.

Mr. Sacher: We made no express admission in regard to paragraph 14.

The Court: You did not deny it?

Mr. Sacher: We did not deny it. The point I am making, your Honor, is that each of these sub-paragraphs in paragraph 14 relies on certain specified pages of the transcript to support the allegation of the paragraph heading which precedes those page designations, and all that we intended to do was to admit that the pages and the contents of the pages submitted in support of each sub-paragraph were the ones on which the petitioner relied.

But as I shall show your Honor in a moment, many of these pages not only do not support the allegations but actually negate them.

Now, certainly it would seem that there would be no validity to a contention that we had admitted doing certain things which are mentioned in the sub-paragraph headings if it appears in the transcript that the very thing that is alleged is negated by the record.

If I may indicate here what I mean, I should like to call your Honor's attention to the very, very first item in paragraph 14(a). Your Honor will observe that that is 1526.

Does your Honor observe that?

The Court: Yes.

Mr. Sacher: That is in Volume I at pages 467-468.

Now, that is an item which is cited in support of 14a to the effect that counsel "Disregarded numerous warnings of the Court concerning their wilful delaying tactics, except for ironical references thereto."

Transcript of Hearing of December 21, 1950

What we find at that page is the following, your Honor. I invite your Honor's attention to the middle of page 468 and this is what I said in part to the Court. It is in the middle of the first full paragraph on that page:

"I want to say to your Honor that we want no more talk or argument this morning. Let's have the witnesses. We want to call them, dispose of them, call one right after the other as expeditiously as possible."

Then the Court said:

"Now, let me see if I understand that. You say, 'Let's go ahead. Call the witnesses at once.' Mr. Crockett says"—

Mr. Crockett was another one of defense counsel—

"Mr. Crockett says, 'No, we must not go further because Mr. Isserman is away. Mr. Isserman's two clients say, 'We protest and desire to have no further proceedings in the absence of counsel'.'"

Whereupon, I said to the Court, "If you will give us a little time I think we can straighten that out and come to your Honor with a uniform decision on the matter,"

and the Court complimented me. He said, "Now, you are talking. If you can in the course of a short recess get yourself arranged, which I think is a very sensible thing to do, talking with the clients of Mr. Isserman, go ahead. I will take a ten-minute recess."

So we took the recess, and, as your Honor will observe on that and the succeeding page, Mr. McCabe was authorized to advise the Court that we would proceed, we did.

Transcript of Hearing of December 21, 1950

Fifteen witnesses were examined and cross-examined that very day.

Now, does that conduct support a thesis such as is stated in paragraph a, namely, that we disregarded numerous warnings of the Court concerning our wilful delaying tactics except for ironical references?

What would be ironical would, it seems to me, be if we were now said to have admitted that allegation notwithstanding the fact that the very first citation completely negates it. Indeed, what it shows is whatever conspiracy was worked out at the moment, was a conspiracy to expedite the administration of justice.

Now, it has been said that from the very early days, that is, way back in November, 1948, counsel for the defendants indicated that their primary motivation in regard to the challenge was the procurement of delay; and clearly the whole sense of the petition here is that the basic motivations, the basic motivations of the defendants and their counsel, was through various ways and means to achieve an unconscionable delay with a view to avoiding a trial of the issues.

That is stated in paragraph 10 as well as in paragraph 14.

And I think it is important that the Court should immediately get a proper view of what the situation was in November, 1948, so that it will become immediately clear that the challenge had only one office to perform and that office was to raise the question of the legality of the method of jury selection in the Southern District of New York, and that it could not and did not constitute an instrumentality for the causing of delay.

Now, specifically what I have in mind is the following, your Honor:

At Volume 17, page 12,969 your Honor will find an opinion by Judge Medina which states the facts concern-

Transcript of Hearing of December 21, 1950

ing our applications for adjournment. The opinion indicates that the trial of the case was adjourned from November 17, 1948, to January 17, 1949. We had advanced three grounds for a continuance beyond November. One of them was that we had had no adequate opportunity to prepare for trial. A second was that Mr. Foster, one of the twelve defendants, was too ill to proceed to trial. And the third ground concerned itself with the environing prejudice which we urged upon the Court made a fair trial at the time an impossibility.

So far as concerns the motion on the basis of environing prejudice Judge Medina denied it. But he indicates in the last paragraph on page 12,972—it is the very bottom paragraph, your Honor,—that the defendants' needs for preparation were an element which entered into his calculations in granting the adjournment, for he says there, "It is stated by Abraham Unger, of counsel for certain of the defendants, in his affidavit sworn to November 5, 1948, that from the date of the indictments to the date of his affidavit the defendants and their counsel have been involved in the preparation of the defense of this case,"—and then these are the critical words to which I invite your Honor's attention:

"They now have the further period of two additional months to pursue and complete their preparation. Under these circumstances it is impossible to find that the case is being stampeded and rushed through before a jury as is claimed. On the contrary defendants will have had ample and adequate opportunity to prepare their defense, especially as each of them must have personal knowledge of his own acts and conduct."

Now, the point I make, your Honor, is this: Here were two months granted by Judge Medina to the defense ex-

Transcript of Hearing of December 21, 1950

pressly for the purpose of enabling them to prepare their defense and now it is urged that we committed an offense of a serious character, that we demonstrated that our purpose was to use the challenge for purposes of delay because we declined to use any part of that two months for the trial of the challenge.

The challenge was filed, my recollection is, on November 15th. I think Judge Medina's opinion indicates it.

(After referring to paper) Yes, this appears also on the upper half of page 12,972, your Honor, where Judge Medina said:

"On November 15 the Defendants filed a challenge to the array and a motion to quash and dismiss the entire panel, venire, and jury list. This was withdrawn on November 16th. On November 17th trial date was set for January 17th."

But the thing that is interesting to note is that indication had been given on November 12th by Judge Medina that the trial would go over beyond—that is, the trial of the main case—would go over beyond November 15th. So the point I make is this: How can it be said that a declination on the part of the defendants to utilize any part of that two months' period allowed them for purposes of preparing their case in the main case can be regarded as an effort to postpone and delay the trial? Because the fact of the matter is that we had to, and did, go to trial on January 17th.

That challenge took two months to try and had we done what Mr. Adams now says we should have done to demonstrate our bona fides in the filing of the challenge was to try the challenge between November 15th or 17th and January 17th, which would have accomplished what? It would have denied us the two months which the Judge

Transcript of Hearing of December 21, 1950

thought it proper to grant for the preparation of the main defense and would then have entailed a corresponding adjournment if the Court felt that the necessities which dictated his original decision required the same consideration in January.

I mention these because I think, your Honor, it is on such—I don't know what to call it—but I think, slipshod regard for the facts that a structure of conspiracy is being erected in this case. I think an insufficient effort has been made to examine the facts precisely as they are, and it seems to me that making point of this matter of not going to trial immediately with the jury challenge and not consuming the two months allotted for preparation of the main case for the trial of the jury challenge is utterly untenable.

The Court: Is it your position that when the challenge to the array of November 15th was withdrawn on November 19th, that notice was given that it would be renewed later?

Mr. Sacher: Oh, yes. I think the record is quite specific. I can't give your Honor a page reference at the moment, but the record is quite specific, I think, that it was indicated that the challenge would be filed and would be tried. As a matter of fact so much must that have been done—I am reasoning now, because I don't recall the exact citation—it does not appear in the printed record; that is in a section of the record which precedes the printed record—but my recollection is it was precisely because it was indicated that the challenge would be renewed that it was suggested that it would be tried forthwith, and that, as I say, would have defeated the purpose of the adjournment.

The adjournment, perhaps I should make it clear, was not granted out of any consideration in relation to the

Transcript of Hearing of December 21, 1950

challenge; it was granted solely in relation to the main case.

Now, point also seems to be made, your Honor, of the motions that were made for continuance prior to November 15th as well as the continuance that was granted by Judge Medina, and here, too, I say to your Honor that we are being made the objects of assumptions, not of legitimate inference.

We asserted among the grounds for adjournment both in the motion of November 8th which was decided by the decision I have referred your Honor to on the ground, among others, that the environing prejudice against the defendants and their political party was such as to make it difficult, if not impossible, to obtain a fair and impartial jury.

Now, it is significant, it is significant—and I think this we pointed out in our answer—that in his opinion of November 22nd, to which I have referred your Honor earlier, Judge Medina said the following, after reciting what exhibits he had read, et cetera:

“I have concluded that there is no such inflamed and prejudiced state of public opinion as would prevent a fair and impartial trial or deprive defendants of any of their constitutional rights. These affidavits and exhibits indicate hostility toward Communism, but make little mention of defendants personally.”

Now, as we had occasion to point out in our answer, this specific finding of Judge Medina's was not sustained—this finding of fact was not sustained by the Court of Appeals, and before I direct my attention to what the Court of Appeals said, your Honor, may I say this: That contrary to the expectations of the petitioners as stated by

Transcript of Hearing of December 21, 1950

their counsel—here again it is assumption which pursues us always—contrary to that assumption we do not intend to retry the Dennis case here or to retry the contempt case. Nor do we intend to roam around the record. It is our purpose to limit ourselves severely to those portions of the record which will extenuate, explain or justify our conduct. That and nothing else. If we have occasion to make reference to Judge Medina or to the prosecution it will be only to the extent necessary to indicate what occurred and nothing more beyond that.

Now, the Court of Appeals in its opinion in the main case said:

“Next, it is urged that it was impossible in any event to get an impartial jury because of the heated public feeling against Communists. That such feeling did exist among many persons, probably a large majority, is indeed true, but there was no reason to suppose that it would subside by any delay which would not put off the trial indefinitely. The choice was between using the best means available to secure an impartial jury and letting the prosecution lapse. It was not as though the prejudice had been local so that it could be cured by removal to another district. It was not as though it were temporary so that there was any reasonable hope that with a reasonable continuance it would subside.”

Now, the reason I dwell on this, your Honor, is only this, that we have got to see the case and the conduct of the parties, all the parties, including Judge Medina, counsel, et cetera, as of the time when they were all called upon to act.

Judge Medina made his determination as to the non-existence of hostility against these defendants. He found

Transcript of Hearing of December 21, 1950

no environing prejudice which would prevent a fair trial, and consequently it might appear to a judge who had concluded that sufficient evidence of such a situation had not been presented that the claims, being unjustified, had perhaps been advanced for ulterior purposes, and might therefore come to think that applications based on such grounds, whether they would be applications for continuance or an application in the nature of a challenge, since it addressed itself also to the question of the environing prejudice, might evidence bad faith on our part.

And what is interesting in regard to paragraph 14a, your Honor, is that each and every one of the items which appear in that paragraph in reference to the challenge transcript—and there are six or seven of them—indicate not any point at which any conduct occurred to which one could point and say, "Here is a delaying action," but at those various places there appear only the statements of the Court that he has formed the belief or that the thought has occurred to him that counsel are engaged in a wilful or deliberate effort to delay the trial.

And I should like to indicate that to your Honor by specific references in the record.

Now, I have already discussed the first item, which is 1,526 in subparagraph a there.

The second item is at challenge pages 1777 to 1780. That is at volume 1, page 618, your Honor, I believe.

Now, all that is to be found at these pages, your Honor, is a statement by the trial judge to the effect that he had read over the record rather carefully—and these I think are substantially his words—namely, that the thought had entered his mind that there was a deliberate, wilful and concerted effort being made by counsel for the defendants to delay the case by various expedients. Nothing is cited to support that statement. The judge's statement was then

Transcript of Hearing of December 21, 1950

followed by denials of each of the attorneys present who asserted that there was no justification for the thought which the judge had said had entered his mind.

Would your Honor indulge me just a moment, please?

The Court: Yes.

Mr. Sacher: Now, I think, your Honor, that the date of this occurrence which I have just referred your Honor to is January 27th. I believe that was the third day of the taking of testimony on the challenge. Now, interestingly enough, your Honor, the day before, on January 26th, I addressed the following remarks to the Court. This your Honor will find at volume 1, page 451, that I am about to read. Now, the statement that I am about to read to your Honor was one that was made the day before this item at 1778. I said to the Court:

"I would like to assure your Honor that so far as we are concerned we regard this challenge as being of such profound significance for democracy and democratic institutions in our country that we have no desire to delay the most expeditious presentation of all the evidence which has a bearing upon the composition of the grand and petit juries in this court, and consequently I want to say just the following in that connection: We called your Honor's attention to the fact that we were being very definitely guided by what the Supreme Court said in the Fay case"—

That was Fay v. New York, your Honor—

"solely because the court had there indicated what it regarded as failures of proof the supplying of which was necessary in order to make out a case."

Transcript of Hearing of December 21, 1950

And then I continued as follows:

"Now, we are prepared to recommend certain procedures to your Honor for the shortening of the hearing if that becomes a matter of concern."

Now, there it is, black on white. This I said myself the day before the judge declared that he had formed the opinion that we were engaged in a concerted, deliberate effort to delay the trial. There it is.

Now, the matter of suggesting shortening procedures, your Honor, came from us, not merely on that one occasion which I have mentioned, but subsequently as well. There are three instances in each of which Mr. Isserman participated, and they are to be found in volume 1 of the record at page 594 and pages 615 and 616. At those pages your Honor will find, I think it was Mr. Isserman himself, or Mr. Isserman and Mr. McCabe who suggested the possibility of taking testimony by a Master, a procedure, by the way, which was I think then being used in one of the New Jersey courts where a challenge to the jury system had been filed.

Another suggestion was made that questionnaires, properly monitored by both sides, be sent out to persons on the jury list. This proposal is to be found in volume 1 at pages 572 and 573, the notion being that certain facts were to be ascertained from these jurors concerning which I shall shed some light as I discuss the challenge briefly so that your Honor may grasp what I am talking about.

And the third offer for the shortening of the trial was made at the earlier pages which I quoted, namely, 594 and 615 and 616, when we offered to stipulate that a certain number of witnesses called would constitute a fair sampling of the over-all composition of the jury list. This was

Transcript of Hearing of December 31, 1950

proposed as a measure to avoid the calling of the individual jurors.

Do we still have some time, your Honor?

The Court: Yes.

Mr. Sacher: The challenge was predicated upon several concepts. I should say that the concept basic to the challenge was that jurors were selected and drawn in a manner which yielded an over-representation of what was called or referred to as the rich, the propertied and the well-to-do, and a severe limitation of poorer groups within the community as well as certain racial, political and religious minorities.

Under the Fay case it was incumbent upon us, as well as under many other cases, to demonstrate that the inclusions and exclusions which we allege to be discriminatory in character were deliberately systematic and intentionally engaged in. It was also necessary to establish by satisfactory evidence the economic status of each person whose name appeared on the jury list.

In the Fay case, where interestingly enough Judge Medina had been counsel for the petitioner on certiorari to the Supreme Court, a majority of the Court—it was a 5 to 4 decision—had held that the challenge was not sustained because there had not been established by satisfactory evidence what the economic status of those whose names were included in the jury list was, and that was the case of a blue ribbon jury. The problem that confronted us was how to prove the economic status of each of the persons on the list. It might occur to your Honor to ask, how did we form a notion that the persons on the jury list were in this exclusive category. The jury list itself indicates substantially the economic status of each juror. It says executive or manufacturer or vice-president or banking, but the Supreme Court said that such designa-

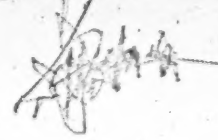
Transcript of Hearing of December 21, 1950

tions would not constitute a sufficient designation for its purposes, so that while for our practical purposes those designations were adequate to indicate the composition, we still were confronted with the problem of proof. So what we did was to begin to call persons who had been on the grand jury which indicted the defendants and persons whose names appeared on various jury panel lists.

The judge suggested that we call the jury officials to testify. We told him quite frankly that, "You, yourself, had made the observation in your brief to the Supreme Court that jury officials never admit that they have engaged in discriminatory practices and we have the same misgivings and therefore we dread to call the jury officials." That was a misgiving, by the way, which was subsequently justified in our very case because, as we pointed out in our answer, the jury clerk, Mr. McKenzie, admitted on cross examination that he had submitted in opposition to a motion to dismiss the indictment in the early fall of 1948 an affidavit which was false to the extent—that is, he admitted it was false to the extent that he swore that the names of prospective jurors were all drawn from voting lists. He admitted on cross examination that so far as concerned, at least the residents of Westchester, who come within the Southern District, no such list had ever been used.

So these proposals concerning the shortening of procedure were made by us in good faith with the hope that they would be accepted and that what the judge was complaining of could be avoided.

I respectfully submit to your Honor, in the first place, that the procedure we were using was not a unique procedure. It was not one we invented. As a matter of fact, the calling of venire men to sustain a challenge was, I think at that very time, being pursued, as I said earlier,



Transcript of Hearing of December 21, 1950

in the State of New Jersey in the Mitchell case, which I will cite to your Honor. We don't have the official citation here. The same procedure had been followed—I don't know that I can say the same, but a similar procedure had been followed—in the International Longshore case, which is reported in 82 Fed. Supp. 65.

So that the record does not establish that the procedures which we used were unorthodox or unwarranted or that they were being unreasonably used and that we refused to adopt alternative procedures. On the contrary, we proposed alternatives but the prosecution as well as the Court—I don't know that I should say as well as the Court, because it was left to the prosecution to decide whether it would consent or not, but the prosecution having declined suggestions for shortening the procedure, none was adopted.

Now, we go to the third item in 14a, which is page 2546. Here it appears that the Court had ruled out a line of proof and that Mr. Isserman sought to make an offer of proof, the Court chided him for making the offer on the ground that it had previously told him not to make offers of proof after the Court had sustained an objection to a question, and Mr. Isserman said:

"It was not clear from the Court's rulings, particularly the Court's statement that the Court would come to an offer of proof later, when I asked if the Court was precluding offer of proof, and the Court did not state that it was, that I continued to make it."

In other words, what Mr. Isserman said he had not clearly understood the Judge's ruling. He said:

Transcript of Hearing of December 21, 1950

"I am now convinced that this Court will not allow me to make an offer of proof on this subject, and I will therefore desist."

That clearly does not sustain the charge in paragraph a. If anything, it negates it.

The next item is page 2839, which appears in Volume 2, at page 1279. Again, there is no conduct on the part of any of the attorneys in the cited reference which affords the slightest basis for a charge of delay. All that appears at that page is that the trial judge, excluding an exhibit, did not state the grounds for the exclusion. Mr. Gladstein respectfully requested a statement of the ground because, as he said, he was left in the dark as to why the exhibit had been excluded. The Court said:

"I may state that one of the reasons you may assume exists as to all excluded evidence from now on is that I feel there has been a wilful, deliberate and concerted effort here to delay the proceedings."

In other words, what paragraph a keeps on doing is building on allegations or statements or findings, so to speak, of the trial judge, but nowhere is there a shred of evidence at all to show that the conduct in respect to which he was making the finding had occurred.

The next item in paragraph 14a is 2842. At this page too, no conduct by any of the attorneys but a charge by the Court again that we were engaging in delay. Mr. Isserman said:

"If the Court please, on behalf of myself and the counsel not here at the counsel table this morning, I object to your Honor's remarks and to your Honor's finding to the effect that the defense efforts to introduce evidence here has been a wilful and concerted effort to delay this proceeding."

Transcript of Hearing of December 21, 1950

Further on the same page he said:

"What there has been, has been a deliberate and consistent effort and a concerted effort to place on this record those facts which bear on the challenge we have made."

That is all there is to that item.

Then, we go to the next item, 3173. Here again we have a repetition of the same thing, no conduct by counsel, statements by the Court, objections by counsel to the characterization. Then, there is the final item at page 3290 of the typewritten transcript, and all that appears in these pages in support of the charge of delay is a statement by the Court:

"* * * my view that there has been this deliberate effort here to make a mockery of justice and to, in effect in the aggregate, sabotage the administration of justice * * *"

I realize that this does not make very fascinating proof, but I have gone through this first paragraph a for the purpose of indicating to your Honor that when you go through these items one by one, they do not contain any evidence of any conduct which will sustain any finding of any kind. So far as the findings of the Judge are concerned, I frankly say that there just is no place in the record in which you can find them. You can find the Judge's accusations but you cannot find anything on which the accusation rests, and I imagine it would be correct to say that if there were such evidence, it would have been cited in this petition, but it is not.

I notice it is quarter to one now—

Transcript of Hearing of December 21, 1950

The Court: Yes, if this is a convenient place we will break off in this matter until 2 o'clock. The Court will take a five-minute recess first.

(Recess to 2.00 p. m.)

AFTERNOON SESSION

The Court: Proceed.

Mr. Sacher: May it please the Court, when we recessed for lunch I had gone through some six or seven items under paragraph 14a in Mr. Adams' affidavit.

The burden of my presentation was that each and every one of these items contained nothing revelatory of conduct by counsel and contained only statements or so-called findings by the trial court in regard to conduct.

I have made an analysis of the remaining six items under the jury challenge which appear under 14a. That is in the second column from the left, your Honor, beginning at page 3345. That is in Volume 2 at page 1610, and this item consists of the following incident: It is the close of the session held on February 11th. The Court directed counsel to have ready on the following morning a statement of what they propose to prove in the balance of the challenge—that is, in the balance of the trial of the challenge. And the Court said in regard to the statement which it requested:

“When I get that statement on Monday morning we will continue with the testimony of Mr. Wilkerson”—he was a statistician who testified in support of the challenge—“and I will examine the paper”—that is our statement of the projected proof—“pass on its sufficiency and take such other steps as I deem advisable.”

Transcript of Hearing of December 21, 1950

On Monday morning Mr. Isserman handed the Court the offer of proof which it requested. The Court thereupon declared that it was insufficient, and my recollection is that at the close of the morning session on that morning, the Court instructed the prosecution to prepare to proceed with his side of the case.

Now, that is all there is to that episode. Clearly nothing culpable.

The next item is 3415, which appears at Volume 2 of the record, at pages 1657 and 1658, and it contains nothing but a direction by the Court that the Government shall proceed with its proof, which I have just indicated.

The following item is again an item appearing at page 3947 of the transcript, and it is Volume 3, at page 1987, and again there is nothing but a colloquy in the course of which the Court again said that we have engaged in delaying procedures.

Now, I do not wish to burden the Court with this oral presentation of these detailed matters, because I appreciate they are best stated in writing where the Court can see them and reflect on them.

The Court: It occurs to me that you have it already in mind, if, indeed, not already prepared, that a sort of concordance would be very helpful. I have in mind the concordance of three parallel columns, the first of which would take the transcript page from the petition, and the second column would give the printed record page, and the third column would list as many references as respondents believe are required to set the petitioners' reference in the proper light. If I could have such a concordance I would then have confidence that I have overlooked nothing that I should have taken into account.

Mr. Sacher: We will be happy to prepare that, your Honor. And so, bearing that situation in mind, I won't

Transcript of Hearing of December 21, 1950

go through these items that I had contemplated going through; but I should like, therefore, at this time to summarize what I think I can safely say will appear in such a concordance, namely, that the items enumerated by Mr. Adams, namely, 14a, d, e, i and j, which I think were to be grouped as falling with the category of those instances which would indicate or demonstrate activity or concerted activity designed to delay the proceedings improperly—I say that such a concordance will show that none of these items, so far as the jury challenge is concerned, certainly, will bear out the premise that there was, one, illegal conduct, or conduct designed to delay, or, two, any conspiratorial action or any basis for any inference of conspiratorial action.

I am persuaded, your Honor, that when the conduct complained of in the petition with respect to the making of the challenge and the trial thereof is dispassionately examined, it provides no basis whatever for the charge that the challenge was made, as it is charged in paragraph 10 to have been made, as a wilful, deliberate and concerted effort to delay the trial of the charges of the indictment, or that in the trial of that challenge counsel for the defense acting in concert wilfully engaged in grossly improper tactics for the purpose of obtaining further delay.

Surely, it will not be contended that such charges are sustained by the fact that the trial judge in his disposition of the challenge was sustained by the Court of Appeals in its denial of the challenge on the merits; for, after all, it becomes an awfully dangerous thing that a lawyer who loses in a case must face the possibility of disciplinary charges on the ground that he has failed.

If the decision of the Court of Appeals demonstrates anything, it is that that Court regarded the challenge as one that was worthy of the most serious and weighty con-

Transcript of Hearing of December 21, 1950

sideration. This is shown by the fact that Chief Judge Learned Hand devoted a third of a 60-page decision to the most serious discussion of the presentations and the contentions made by the defendants in support of the challenge. It is inconceivable that the Court of Appeals, which had before it the trial judge's finding of wilful delay upon our part, which is contained in paragraph 10 of the petition here, would have given the extended consideration which it did had it shared the trial judge's views of the matter, namely, that there was no real merit to the challenge and that it had only been used as a device for the perversion of the judicial process. Important as the extent of the Court's consideration of the challenge is, it is overshadowed by the Court's finding that in selecting the districts in which the jury officials sought prospective jurors, the jury clerks discriminated in favor of the wealthier districts. In other words, the Court of Appeals in so many words found that the clerks did discriminate in favor of the wealthier districts, and the divergence between our position and the decision of the Court of Appeals arose over the question as to whether such discrimination was an illegal discrimination, and it was on that point that the Court decided against us.

As a matter of fact, at one point, the Court through Chief Judge Hand, adverting to some factors that might be used as tests of the contentions we made, said:

"However, after making allowances both for the discovered errors in the charts"—

that is in some charts we had submitted—

"and for the unanswered possible disparities we have just discussed, it appears to us that it would not be candid to say that these would account for the ter-

Transcript of Hearing of December 21, 1950

ritorial distribution of the panels analyzed in the charts. If notices were sent out"—

that is, notices to prospective jurors—

"upon the basis of the voting lists alone without any principle of selection, they would not, we think, have resulted in such panels as those."

That is the type of panel we had complained of.

The extent to which the selection of the wealthier districts operated to exclude various segments of the population from participating in the jury system in proportion to their numbers is indicated by the following observation in the Court of Appeals' opinion in respect to our contention that discrimination had been practiced. Judge Hand wrote as follows:

"Nothing need be added, regarding the asserted discrimination against Negroes. So far as they were not represented on the list in proportion to their numbers, there is no evidence that it was on account of their race; and the disproportion is adequately explained by the fact that they are among the poorer groups."

An observation which confirms what I said earlier, namely, as to the finding of the Court as to the nature of the discrimination practiced. I respectfully submit that from the foregoing it is clear that if all that we had on the question of our bona fides, in making the trial of the challenge were the Court of Appeals, it alone would be sufficient to negate the trial court's finding of a conspiracy, to delay the trial of the indictment by means of the challenge and the trial thereof.

When to this there is added what I think we have conclusively demonstrated, or will have—I assumed by this

Transcript of Hearing of December 21, 1950

point that I had made this analysis of a, d and j—that the record is utterly barren of any evidence to sustain the finding. It is evident, for the purposes of this proceeding certainly, that that finding has no validity, and the charge of conspiracy with respect to the challenge which the petition makes in both paragraph 10 and paragraph 14,—must be said to be not only unproved but disproved.

Now, I shall not, of course, have time in the period that remains to deal extensively here with paragraph 14. Mr. Isserman will deal with as much of it as he can within the time available to us, but before I leave the subject of conspiracy I should like to make one or two observations concerning what I think is an inherent threat to the independence of the bar in the nature of the conspiracy charges made in this particular.

If the notion prevails that lawyers who represent defendants in criminal conspiracy cases may be exposed to a charge of conspiracy themselves because of the common positions they adopt in the defense of their respective clients in response to an identity of interest among those clients, then I submit the independence of the bar is jeopardized.

The possibility is obvious that there will be a reluctance on the part of lawyers—

The Court: You need not argue that, Mr. Sacher. You recall that when Mr. Adams was arguing I called his attention to the fact that in many cases, especially conspiracy cases, proper trial strategy may involve a concert of action. That is the same point you are making now, I think. It is fully apparent and I don't understand that Mr. Adams questions it.

Mr. Sacher: Then, I shan't pursue the subject, your Honor.

Transcript of Hearing of December 21, 1950

The danger, however, of this concept as it has been applied to us in this case is that the overwhelming preponderance of instances cited against us in paragraph 14 are nothing but instances of the normal functioning of lawyers in everyday courtroom advocacy, and yet these items have been marshalled against us as evidence of a conspiracy.

Now, in saying what I have, your Honor, I do not overlook the items of the alleged individual acts of misconduct which are set forth in paragraphs 15 to 18 and to some of which reference has been made earlier today, and I shall now address myself to some of those, but before I do I should like to make this observation, if I may, to the Court, namely, that the proper appraisal of these individual items in paragraph 15, either in their bearing on the question of conspiracy or on our fitness to remain members of the bar apart from conspiracy, requires that due regard be had for the context in which they occurred, for, as Mr. Justice Holmes once wrote, "Acts apart from surrounding circumstances are indifferent to the law." And the context which I should like to call to the Court's attention is the following:

First, the formidableness of the questions with which we were confronted in the case. I refer to the large constitutional issues concerning the freedom of expression under the First Amendment.

Earlier this morning Mr. Adams read the oath which we took when we were admitted to the bar of this court. If I recall his reading, he stressed the obligation which we undertook to support the Constitution.

I say to your Honor with all the solemnity at my command if there was one task to which we devoted ourselves with a singleness of purpose in the trial of *United States v.*

Transcript of Hearing of December 21, 1950

Dennis it was to the support and upholding of the Constitution, for underlying the whole prosecution were the questions of the constitutionality of the statute, namely, the Smith Act, under which the defendants had been indicted, the constitutionality of its construction and application in the circumstances disclosed in the case, and it was to these large questions that we had to address ourselves and did.

I should say in all objectivity that much of the difficulty that we encountered in discharging our responsibilities in the course of the case was the failure on our part to persuade the trial judge of the validity and the soundness of our constitutional position. The prosecution argued—and I think it is true to say that the Court assumed—that cases like *Gitlow v. New York* and *Whitney v. California*, as well as *United States v. Dunn* had all disposed with finality of our constitutional questions, and this was the view of the Court throughout the trial and this was the view of the prosecution throughout the trial, and the first time that any acknowledgment was made that there was substance to the constitutional position which we advocated came on appeal in the Court of Appeals when the Attorney General conceded that there was a substantial question concerning the constitutionality of the statute both on its face and as construed and applied.

The relationship between the constitutional question and the difficulties encountered in the conduct of the trial was this: that the indictment charged the defendants with a conspiracy to teach and advocate certain proscribed political doctrine. No overt act had been pleaded in the indictment, no charge of commission of physical criminal acts was complained of, and we were in the realm of what we in our view of the First Amendment regarded as being exclusively the realm of expression, and as each book,

Transcript of Hearing of December 21, 1950

as each pamphlet, as each piece of paper was brought into the case by the prosecution—and there were over a thousand exhibits in the case—question necessarily arose from a constitutional as well as from other legal points of view as to the admissibility of much of this material and the propriety of its use as the basis of criminal prosecution consistent with the First Amendment.

Further difficulty lay in the fact that we proceeded to trial in a context of the greatest hostility, a context which was later attested by the Court of Appeals, and that hostility extended not only to the defendants themselves, but as the trial proceeded enveloped the lawyers as well.

The work which we had to do in connection with the challenge, for instance, was gruelling work and your Honor will find in Volume 18 of the record the clearest evidence of the time and the labor that was devoted to the preparation of the elaborate facts and statistics to sustain the burden which we felt we had undertaken in the filing of the challenge.

In this connection it is interesting to observe that the Court of Appeals paid tribute to the thoroughness and the labor which had been displayed in the exhibits that we submitted in support of the challenge.

To add to our difficulties the indictment was so vague in its contours, it covered possible action from 1920 to date, and distances from here to Moscow and back again, every witness was a surprise witness. We had no indication of what part of the world the witness might come from, what type of utterance he might develop, and all this went on for nine long months. There was a total of 303 half-day sessions, approximately 169 days of actual trial.

I was in court and participated in the proceedings for approximately 145 total days or a total of about 260 half-day sessions.

Transcript of Hearing of December 21, 1950

Judges and lawyers have spoken understandingly and feelingly of the problems that confront lawyers in an ordinarily long trial, a trial which runs for two or three or four weeks, one which does not deal with the explosive political questions which were involved in our case. The tension was tremendous.

I think I state things which would be apparent to any judge of experience. And in these circumstances I say to your Honor not only on the basis of my own representations, but the context of the record discloses that whatever I said or did was not in any way premeditated, was not in any way deliberated. In many instances I recognized promptly that I had perhaps exceeded the bounds of propriety and renounced immediately any intention to reflect unfavorably on the Court or on the procedure adopted at the trial.

Many of the instances flowed from the fact that the Court charged us repeatedly with having been engaged in this wilful, deliberate and concerted effort to delay.

Will your Honor indulge me just a moment, please?

The Court: Certainly.

Mr. Sacher: In many instances or in some instances the remark attributed to me and complained of here flowed from what impressed me at the time as being too hasty a decision by the Court without affording me an opportunity to be heard. An example of this is item 4 of paragraph 15 which charges that I said at one point to the Court—this appears at page 13 of the affidavit, your Honor—that I said to the Court: "I repeat, this is an Alice in Wonderland procedure. We always get the sentence first and then the trial."

Undoubtedly I should not have addressed the Court in words of that kind; but when the expression is read in its context, and when it is realized that it was a literary

Transcript of Hearing of December 21, 1950

form of expression to the effect that the Court had decided without first affording me an opportunity to be heard, I think the incident will be understood not as an example of that violation of the integrity of the Court which Mr. Adams seems to think justifies the demolition of a lifetime of service at the bar.

Specifically, immediately preceding this remark of mine the record shows the following: The Court had an exhibit before it, and he said: "I have it before me, Mr. Sacher."

And I said, "All right, just by way of illustration."

And the Court said, "It is just that we are not in agreement about it, that is all."

And I said, "I know we are not. That is why I am addressing your Honor. There would be no occasion to if we were in agreement."

And the Court said, "Yes, but I sometimes find a disposition on the part of you and your colleagues when I have ruled something out to get it in in some other way."

Obviously, a charge of impropriety on our part.

And I said, "No, because you rule before we have a chance to address you."

And then he said, "You may address me."

And it was then that this statement attributed to me occurred.

The next item that Mr. Adams mentioned, as I recall it, was item 5 in paragraph 15 in which it is alleged that on February 4, 1949, during the challenge of the jury system, and in the course of the direct examination of the witness Marcantonio by Mr. Isserman, the witness was asked to state how long certain low rent housing projects had been in existence, and the Court directed counsel to proceed with interrogation after having ruled on an objection, and then it is stated that I commenced speaking,

Transcript of Hearing of December 21, 1950

and the Court stated twice that he did not desire to hear me at the time, and that despite the statement I said as follows:

"But you have characterized my conduct as well as that of trial counsel, and I wish to deny it on the record, and I wish to say that your Honor is aware of the fact that there are 40 or 50 newspapers here, and on the threshold of Congressman Marcantonio's testimony you have taken occasion to say that his testimony is being introduced for the purpose of dragging and delaying the trial."

And the Court said: "Did I say that?"

And I stated:

"Well, you imply that very broadly. If your Honor wishes to deny it I shall be glad to have the denial. But I got the impression very distinctly that your Honor's observation was made just on the threshold of the Congressman's testimony and that it was designed to color the effect and impression to be given to it, and I do not believe, your Honor, that that is appropriate."

And the Court said: "If you are only trying to provoke me, Mr. Sacher, you are wasting your time."

Now, of course, I was not trying to provoke the Judge. But a statement in regard to the dragging of the case was one which gave me the fear that precisely that charge would be exploited by the press as it had been on previous occasions. There was no design or intent to charge the Court with anything improper. It was, rather, to call the attention of the Court to the fact that the characterization was being made in the presence of newspapermen and

Transcript of Hearing of December 21, 1950

that it would be disseminated and that it would not serve the immediate limited purpose which the Court might have had in mind.

A point is also made of item 26, and I think it should be said that in describing that item, which is the occasion of June 3, 1949, when on the occasion of the holding of the defendant Gates in contempt, Mr. Adams took considerable liberties with the record. He charged us, as I recall it, this morning, with having joined with the defendants in improper conduct. The truth of the matter is, as the record shows, that all that transpired was that when Judge Medina held Mr. Gates in contempt, the defendants rose. I was standing at the time. I was examining him, or I was stating an objection to a question, rather, that had been put to him on cross examination, which was the occasion for the holding in contempt. None of the lawyers did anything. The proceedings of the court were not interrupted. The Court sentenced two of the defendants for contempt for having spoken out in response to the Court's holding, and in a matter of moments they were seated and the trial was continued.

Frankly, your Honor, I don't know what security there can be at the bar if an episode of this character can be made a basis for a demand for disbarment. We had not been requested to do anything. The situation was of such short duration that there was virtually nothing to be done. We were limited, each of us, in the representation of one or two clients. We had no power of control over anybody else. We did not decline to do anything that might have been asked or was asked of us and, as I say, the matter subsided in no time.

Certainly I am aware of no conduct on my part, either active or passive, that can be said to constitute a violation of my duty as a minister of justice to the Court in the circumstances in which the matter arose.

Transcript of Hearing of December 21, 1950

Finally, Mr. Adams concluded his presentation with a reference to the last item in paragraph 15, namely, item 36, in which I said:

"They (the early Christians) did so many things, more than this evidence disclosed, that if Mr. McGohey were a contemporary of Jesus he would have had Jesus in the dock."

I think I should say to the Court that in the context in which this was uttered, no impropriety of any kind was intended by me as attributable to Mr. McGohey. I was not speaking of a current situation in the first place. I was talking about 2,000 years ago. I was talking of Mr. McGohey as a contemporary of Jesus and not Jesus as a contemporary of Mr. McGohey at the present time. The discussion at the time that this statement was made revolved around the question of the significance and the weight of alleged secrecy and the use of alleged false names by members of the Communist Party. Your Honor will find that episode at page 32 of the affidavit.

The occasion for the remark was to draw a comparison between the practices of all the persecuted minorities and the design of my argument at the moment was simply to state, as graphically as I can, how that secrecy and concealment did not necessarily import criminality, that it might import, as it did in the case of the early Christians, devices for self-preservation.

Of course, when that item receives the reading that Mr. Adams gave it here, as he dramatically closed his presentation, it seems to take on a rather unfeeling attitude on my part. I dare say that upon reflection I would have unhesitatingly made whatever amendments Mr. McGohey thought he might need in the situation.

Transcript of Hearing of December 21, 1950

At the moment, however, I felt that a historical allegation had been misunderstood and made to look like an attack on Mr. McGohey, which was altogether unintended.

The last item I recall among these that Mr. Adams mentioned was an appearance, I think late in 1948, before Judge Ryan in which the Judge expressed the view that in expressing concern for the protection of constitutional rights of our clients, I had in some manner offended and been contemptuous. I take it the purpose of this item is to give off the impression that I am just a generally contemptuous fellow who just doesn't know his place in the courts. When your Honor reads the context of this, you will probably regard the expression on my part as clumsy, but not as being contumacious and Judge Ryan himself recognized thereafter in discussion or colloquy in the course of the ensuing argument that I had not thereby disqualified myself even for the morning in which these questions were being discussed.

I think, your Honor, that it has to be realized as an historical truth attested by experience in similar cases that cases of the kind in which we were engaged are those which lead so frequently to the kind of passages-at-arms, so to speak, that occurred in the course of this trial. The question is not, I submit, whether the trial judge was or was not guilty of misconduct. The question, I think, is not whether we were or were not guilty of misconduct. I am talking in terms now of understanding the origins of conduct.

To determine the basic question in this proceeding, namely, that of our fitness to remain at the bar, it seems to me the basic question is: how, why, in what circumstances did these events occur? That the situation was extraordinary, that it was exceptional, that this kind of a case does not occur perhaps more than once in the life-

Transcript of Hearing of December 31, 1950

time of any lawyer, as it was just once in my 25 or 26 years at the bar, is evident.

It would also seem to me quite clear that to stake a lawyer's career on the basis of one extraordinary, unusual, back-breaking experience is to again, I submit, invite the bar to hazards which fairly and reasonably should not be applied.

Your Honor, I hope you will indulge me if I take just a moment to point to a trial which took place in what was then the Colony of New York in 1735, namely, the case of Peter Zenger.

Zenger was a printer who was indicted, tried for seditious libel. He was represented by two lawyers initially by the name of James Alexander and William Smith. These two lawyers filed a challenge to the validity of the Commissions issued to the two judges who presided at the trial. For their pains these two lawyers were disbarred. A tablet in the Andrew Hamilton Hall of the New York County Lawyers Association, which is one of the petitioners here, commemorates those two lawyers and refers, with disapproval, apparently, to their disbarment.

But when these two lawyers were removed Andrew Hamilton was retained to represent Peter Zenger, and in the course of that trial your Honor will find that this great advocate, a man who was called the Day Star of the American Revolution, appeared before these judges, these very two who had disbarred Alexander and Smith, and engaged in argument, in advocacy, in analogies, which aroused the court.

At one point when the Attorney General cited cases of the Court of Star Chamber to sustain the proposition that in a criminal libel case truth was not a defense, Mr. Hamilton observed, "Those are Star Chamber cases, and I was in hopes that practice had been dead with the court,"

Transcript of Hearing of December 31, 1950

clearly implying that the Court before which he appeared, a court appointed by King George II, was a continuation of the Court of Star Chamber.

Those judges reproached him gently, telling him that he was unmannerly, and that if he would be mannerly he would get all the privileges to which he was entitled.

Now, Hamilton, at the time when the law of the Colony was that evidence of the truth of a libel was not admissible in evidence for consideration by the jury, then addressed the jury in this wise: he told them that in his view the refusal to receive the testimony should be considered by them as equivalent to the suppression by any individual of the truth and that they would be warranted in drawing an inference unfavorable to the prosecution as a result of that procedure.

And at another point he assured the jurors that under *Bushels* case they enjoyed complete immunity from whatever verdict they might render, and therefore they had nothing to fear if contrary to the instructions of the Court they would return a verdict of not guilty.

Hamilton had gone to such lengths that when the chief justice addressed the jury he said to them the following: I read it to your Honor because I think it is pertinent to many of the charges that are made here against us, although with less foundation than the charge was made against Hamilton. The chief justice said:

"Gentlemen of the jury, the great pains Mr. Hamilton has taken to show how little regard juries are to pay to the opinion of the judges and his insisting so much upon the conduct of some judges in trials of this kind is done no doubt with a design that you should take but very little notice of what I may say upon this occasion. I shall therefore only observe to you that as the facts or words

Transcript of Hearing of December 21, 1950

in the information are confessed the only thing that can come in question before you is whether the words as set forth in the information make a libel, and that is a matter of law no doubt and which you may leave to the court. But I shall trouble you with no more of my own but read to you the words of a learned and upright judge to the same effect."

And when the chief justice had said this, Hamilton arose and said:

"I humbly beg your Honor's pardon. I am very much misapprehended if you suppose what I said was so designed. Sir, you knew I made an apology for the freedom I found myself under a necessity of using upon this occasion. I said there was nothing personal designed. It arose from the nature of our defense."

The judges appointed by King George II did not disbar Andrew Hamilton, and on the occasion of the acquittal of John Peter Zenger the people of the City of New York extended the keys of the City to him.

I have one or two observations concerning myself, your Honor, before I have done this afternoon.

Mr. Adams has referred to the opinions of the Court of Appeals and has leaned rather heavily on what those courts have said concerning the conduct of the lawyers in this case. I think I should make the following facts known to your Honor, namely, that two of the specifications against me which appear in paragraph 15 of the affidavit and concerning which Mr. Adams has not seen fit to make any mention to your Honor, were reversed by the Court of Appeals on the ground that the evidence did not sustain them. That is, item 15 of paragraph 15, and item 20. Item

Transcript of Hearing of December 31, 1950

15 appears at the bottom of page 21, and item 20 appears in the middle of page 24.

There is one point of significance about both these items, your Honor, that I should like to invite your attention to, and that is this, that both items charged me with having deceived the court and using improper methods or improper representations concerning matters of fact. The reversal of these two items indicates, I think, an appreciation on the part of the Court of Appeals that what is involved here was in no event corrupt conduct, dishonest conduct or disloyal conduct.

I should in this connection also observe the following statement made by Chief Judge Hand in the course of the case of United States vs. Dennis.

I represented Mr. Benjamin J. Davis, Jr. throughout the trial. Toward the end of the trial and on the eve of summation he decided that he wished to sum up to the jury himself and dismiss me as counsel. When the question arose as to whether or not the declination of the Court to permit him to sum up to the jury himself in the face of such dismissal constituted error, the Court of Appeals held that it did not, and in the course of his opinion Chief Judge Hand said the following:

"There remains the judge's refusal to allow the defendant Davis to sum up to the jury at the conclusion of the evidence. Davis had been represented during the whole trial by Mr. Sacher with great skill, loyalty and address. Davis has indicated not the slightest dissatisfaction,"

et cetera with the manner in which Mr. Sacher had conducted his defense.

In a later portion of the same section Chief Judge Hand said:

Transcript of Hearing of December 31, 1950

"If the judge feared that the result would be"—
that is, the result of permitting Mr. Davis to sum up for himself—

"as he said another of the outbursts which he had found it so hard to deal with, it appears to us that he was within his powers to confine Davis to the exceptionally capable representation of Mr. Sacher."

Your Honor, it is a little embarrassing to speak in my own behalf words of praise of this kind. I will content myself with making this observation: I just cannot conceive that the chief judge of the Court of Appeals of this Circuit would have spoken of me as having manifested great loyalty, skill and address and exceptionally capable representation had the thought entered his mind that he was writing these fine words of a man who was a confederate in a nefarious conspiracy to obstruct the administration of justice or of a man who by his own individual conduct had shown himself to be unworthy of the high office which he holds.

I have been a member of the bar for 26 years now. I have dedicated, I can say with all regard for truth, my professional life to the service of those who were in need of service. I have not made of the profession a money-grubbing activity.

I believe, your Honor, that employed, as I have been, for the greater part of my career as an attorney for labor and for other minority groups, that such modest success as I have enjoyed in persuading the courts to extend the benefits which it lies within their powers to grant I have contributed to the strengthening of the regard of the people for our judicial institutions. To the extent that I have dealt honestly with the poor and other oppressed groups in

Transcript of Hearing of December 21, 1950

our community, I think I have also given to them a confidence that the bar contains within itself men who are not separated from the people and have thereby commended the bar to the people.

In all confidence, your Honor, I assert that the ends of justice, the end of the achievement of an independent bar will not be served if I am banished from the profession or from the bar of this Court.

The Court: Mr. Isserman.

Mr. Adams: Does your Honor desire to hear any reply on my part now, or after the other respondent has finished?

The Court: I should say after the other respondent has finished.

Mr. Isserman: If the Court please, before commencing, I would like to inquire of the Court with respect to the Court's intention with respect to how late we are sitting this afternoon. I can curtail my argument without doing it too serious an injustice, because much of the material will be set forth in a brief and will therefore guide myself somewhat, to the extent I can, by the Court's desire in the matter.

The Court: I will sit as long as counsel wish to be heard.

Mr. Isserman: If the Court please, we have prepared in part the concordance that your Honor had suggested. It is a chronological listing of all the transcript references, their pages, in a joint appendix, the date of each occurrence, and the incident to which it refers. We do not have at this point the additional pages in respect of each incident that we would want the Court to look at to fully explain it. With the Court's permission I would like to hand this concordance to your Honor. It may be of some aid in following the incidents through the volumes.

Transcript of Hearing of December 21, 1950

Mr. Adams: I suppose we may have a copy?

Mr. Isserman: Yes, certainly (handing papers to Mr. Adams.)

I would like at the outset to spend a few minutes on the state of the case as it now appears before your Honor and to make some brief comment on some of the remarks by Mr. Adams.

True this is an opportunity for hearing for the respondents. The respondents are taking advantage of it. This is the first time when in a court of first instance these matters have been raised in a way that we could respond to them.

True also that in our judgment the state of the pleadings in this proceeding is such that it became clear that evidence would not be necessary.

If the petitioners had proceeded by the introduction of testimony outside of the record and had made allegations concerning such testimony in their petition, the shape of our answer would undoubtedly have been different.

And also if reply had been made to our answer there might have been the need for the taking of testimony.

But as we see it, and as the Court indicated, the petition and answer are in such state that it would seem that the facts are admitted and of course by that we have always meant the record facts. The record is in evidence, we both rely on the record, we admit that the incidents set forth in the record are the incidents which took place, and we deny the legal conclusions which are drawn from these incidents in the charges in the petition.

Whatever might be said of the conduct in this case certainly one must take exception to the remarks of Mr. Adams that the logical conclusion of the petition we have stated in the answer is that fraud and subornation of perjury and such matters are permitted, and that we advocate that

Transcript of Hearing of December 21, 1950

lawyers have a right to engage in criminal acts of that kind in a defense of their clients.

That certainly is not, and has not, been our position and is not a summary of the position in our answer.

We do say that the conduct charged here, all of which occurred in the courtroom, is so imbedded in the matrix of the events which took place in that courtroom in the course of our functioning as lawyers and under the circumstances of the trial, which I will go into, were such as do not warrant any charge of unfitness to practice law in the future, as both Mr. Sacher and I have been practicing in excess of 25 years.

We have suffered a good deal, as Mr. Sacher pointed out, from generalizations. Mr. Adams said today, after referring to one incident which involved me, and the question of being seated and some directions to the marshal that I be seated, which I will go into, that this was a most disgraceful episode and that it occurred again and again throughout the trial. He said, too, that the record is full of these things.

I would take it by now, your Honor, that the specifications in the petition are the ones which we must meet. If there are other specifications which refer to this conduct which are of any value to this Court, they should have been forthcoming by now. There has been no filing of a supplemental specification since the drafting of the petition, which, according to Mr. Adams, was filed way back in January.

The incident concerning myself to which Mr. Adams referred was perhaps the most extreme incident in which I was involved. It was not one which occurred again and again and again. It was one which occurred once and not more in nine months of trial.

When we go into that, without saying at any time I am proud of it, because looking back at it objectively I am not,

Transcript of Hearing of December 21, 1950

when you take it in the context in which it occurred and the pressure under which counsel, from a reading of the record, must have been laboring at the moment in mid-summer after months and months of trial, the incident takes on quite a different coloration, quite a different qualitative substance, from the way it was characterized here this morning.

When we look at it again and again in particular, we will find that time and again the various specifications which are set forth in this specification are simple matters of advocacy which do not at all bear out the charge. It is not that we bring in other incidents to show that things were in the normal course. We make some brief allusions to the thousand others, but the very incidents which are brought here, if they are the measure of unfitness as charged here, I say an entirely loose standard of fitness is being projected.

If a reason is to be found, it may perhaps be found not in that we as lawyers identified ourselves too closely with our clients—although we did have an abiding faith in their innocence and an abiding faith in the unconstitutionality of the Smith Act, which we argued in the Supreme Court only a few weeks ago—but because there has been an identification of us with what the public thinks of our clients, which is quite another matter.

No case is tried in a vacuum. Justice Jackson in a speech to a bar association recently pointed out the tremendous effect of the modern means of propaganda on justice.

Former Judge Rifkind in an article in the Law Review, which will be cited in our brief, again raised the problem of how to insulate a jury in the normal criminal cases from the impact of the press, and the problem raised by the rights of speech on the one hand in newspapers and the

Transcript of Hearing of December 21, 1950

rights of a judicial proceeding to go on without too much pressure or without pressure from the outside. But if there ever was a case in which there was the most intense pressure from the outside into that courtroom, with the presence of 50 newspapermen, half the courtroom occupied by them, and with announcements over the radio day after day, including comments on the conduct of the lawyers, this was the case. This is a matter of record, because in Volume 17 are various motions for continuance based on the state of tensity and emotion and subsequently our motions for mistrial, which were made on the ground that the hysteria was too great indicated in substantial detail the kind of pressure which was being exercised in the community and which necessarily had their effect in the courtroom.

Your Honor will recall that in our answer in this proceeding we set forth, and the Court of Appeals found, not that there was no hysteria, but rather that it was so extensive that a change of venue could not help and so deep seated that a short or unreasonable delay or adjournment in the progress of the trial would not have availed the defendants, because the Court found that the situation was worse in that respect, as the trial went on, than it was when the trial started. That atmosphere, certainly having an impact in the courtroom, must have had it on the lawyers, on the prosecution, on the judge, on the trial court, and everyone connected with the proceedings. It heightened the tensions in the courtroom. It made ordinary procedures difficult, as your Honor will note, as your Honor goes through this record, and created a situation which is not on a par with any trial situation that I have even been in in the great many years I have practiced law, and I doubt it is on a par with any in this country in our history except perhaps when we go back to the alien and sedition days,

Transcript of Hearing of December 21, 1950

when in the Bowers book I was reading the other day on Jefferson and Madison, he said in that period, in the effort to enforce the alien and sedition laws, the sedition law being very akin to the Smith Act, the lawyers were assailed by the bench and by the press in that period. I say perhaps there is a parallel.

I don't think the pressure in the Sacco-Vanzetti case was nearly as great as in this case. We made a reference to that in our motions when we tried to establish the need for a very thorough investigation or the bias of the jurors on the voir dire.

I think it is important to glance sharply at the charge filed here, particularly the one alleging the conspiracy or the concerted agreement. That is paragraph 14. In essence, it charges that there was a wilful, deliberate and concerted effort to delay and obstruct the trial. That is the basis of the charge. The effort to delay and obstruct the trial. Then there is a listing of several objectives. This delay and obstruction was for the purpose of causing disorder and confusion, it says, and to prevent a verdict, and was for the purpose of bringing the Court and the entire judicial system into general disrepute.

Then there is an allegation of methods. That is, the methods by which delay and obstruction would be caused. And these were by endeavoring to divert the Court and jury from the serious charge; by making unfounded and unjustifiable attacks on the presiding judge, all the judges of this court, and the jury system; and finally by other wrongful and unjustifiable conduct.

Now, the attack upon the jury system seems to have been one of the methods used, but it was conceded here today that the filing of that challenge, which was the at-

Transcript of Hearing of December 21, 1950

tack upon the jury system—there was no other—was a proper act, charges that within the procedure certain things were done which are alleged to be improper. But at this point the alleged method of attacking the jury system as being a course of delay and one to obstruct the trial would seem to me no longer be before your Honor.

Also the attack upon all the judges of this court: If the motions we made ~~are~~ not before your Honor, these motions which we all signed,—and they were joint motions—then there is nothing in this record which indicates at all that we attacked all the judges of the court. The so-called attack, if it can be called that, was a motion which was filed in connection with the jury challenge in which it was requested that a judge from another district be brought in to hear the challenge because the system had been in effect so long; it had been very specially sponsored by Senior Judge Knox, and had been acquiesced in and supervised by the other judges.

That motion is in Volume 17; it is in proper legal language, and if this is the attack upon the judges it just highlights our point that the simple steps of advocacy in this case in some manner become attacks and warrant us to punishment, perhaps because it is the kind of case we were in.

The essential allegation then in the charge which we should concern ourselves with is undoubtedly the expression “by other wrongful and unjustifiable conduct.”

Now, that conduct is set out presumably in subdivisions of paragraph 14, and it is alleged that these were the acts in paragraph 14 which were designed—to do what? And I want to keep that before you. To delay and obstruct the trial, because that was the essence and purpose of the conspiracy. And if these acts, albeit some of them were acts which could not be approved of in normal circum-

Transcript of Hearing of December 21, 1950

stances, the question still arises, did they obstruct and delay the trial, or could they have been designed for that purpose? And I raise that to put this matter in sharp focus, because an examination of them in their totality, in their subdivisions and individually simply do not add up to efforts to delay and obstruct the trial.

Now, Mr. Sacher has already suggested that it is important in a consideration of these incidents to consider the nature of the case. There was no overt act alleged; we were faced with a trial in which books became the principal elements of evidence, and acts which normally were considered lawful within the First Amendment, meetings, conferences, and so on, and political philosophy became the subject of proof before a jury; and that carried with it a host of problems, such as the works of Marxism-Leninism; the question of reading from those works or not reading from them, how they should be read and how they should be introduced—that became a major problem.

And, if the Court please, if we were concerned about delay, then these books which had been introduced in evidence in their entirety in some cases by the Government could have been read by us from cover to cover, and really one such book like the History of the Communist Party, which has some 400, I believe, or some 300-odd pages, would have taken more time than 15 or 20 or 30 or 40 of these incidents if delay is what we were looking for.

Now, if your Honor will—and we will aid your Honor in this—we will check through to see the minimum that was read out of these works by the petitioners and by the defendants—I mean by the respondents on behalf of the defendants, and your Honor will see that here was an avenue of delay, if that was the intention, which was wide open and not availed of by counsel.

Transcript of Hearing of December 21, 1950

Now, we ask the Court to consider also that the issues in the trial, because of no bill of particulars, were wide, and in a sense were not capable of comprehension from our standpoint for the preparation of witnesses until the Government's case was going on.

For instance, it was charged in the indictment that the criminal conduct was committed in the Southern District of New York and elsewhere. We asked in a bill of particulars where elsewhere, and it was denied, and we are not challenging the validity of that ruling, of course; but it did not eliminate our problem, because we did not know when the first witness took the stand that he would testify about Chicago or Boston; and throughout the trial, as witnesses were called, we never knew until the witness was speaking what area he was going to cover; and I think our answer points out the number of states from which witnesses came, and we were then put upon the burden of finding the evidence which would meet that which was being projected.

Not only that, while the conspiracy was charged to have occurred between 1945 and 1948, the evidence went back to 1935, and even to 1929 on occasions; and writings of individual defendants and their speeches were introduced even for years before the passage of the Smith Act to show their intent.

We are not quarreling with that ruling, of course, here; but the scope of the case became so broad as a result that we had tremendous problems of getting the witnesses in time to place them on the stand as the case progressed.

The Court: Is it your position, Mr. Isserman, that the reiterated objections and arguments with which you were charged were made deliberately in order to obtain delays so that you might procure absent witnesses?

Mr. Isserman: No, of course not, your Honor.

Transcript of Hearing of December 21, 1950

The Court: I thought—

Mr. Isserman: No. What I am saying is that there was such a problem created for us as lawyers in handling the cases, that this was one of the circumstances which put us under pressure, and I was beginning to explain that this accounts for the use of an expression which sounds invidious, that we worked in shifts. Your Honor will remember that that was language which was used, that we worked in shifts.

Well, if that means anything at all, it meant that several lawyers were in the courtroom presenting their case through their witnesses while others were preparing other witnesses.

Now, at all times there was no delay because witnesses were not ready. I am not making that point at all, but I am saying that the fact that some lawyers were out of the courtroom—and there are stipulations on record, and we can show the tabulations and show the extent to which this took place—negates the idea that there was anything invidious in so-called working in shifts, and secondly, negates the idea that the intention was to harass and obstruct the trial.

Your Honor will remember when the Nazis were being tried in Washington in that long trial—I don't remember how many there were—but each came in with his own lawyer; each lawyer was in the courtroom the entire period, and there was constant turmoil in the courtroom, which did not happen in this case.

And here on very many occasions lawyers absented themselves for legitimate business, and that is the point I was making, in connection with the trial, while other lawyers carried on the conduct of the trial in the courtroom in the examination of witnesses or the cross-examination of witnesses as the case might be.

Transcript of Hearing of December 21, 1950

Your Honor will recall too that our surprise came on each occasion when the Government was introducing its evidence, so that we were to some extent, when our turn came to present evidence, ready with witnesses. But the acts which are charged to be acts of delay, my point is were not acts of delay at all, or were so miniscule in their proportion that they had no value in giving time, and that many things which could have given us more time if we were looking for improperly delaying, or even legitimate delay, we did not avail ourselves of.

For instance, I point out the reading of the books would have taken much more time than many of these incidents put together.

In that connection I would like to refer to one incident which I would consider is one of the more serious charges against me. I consider the six items on which I was held for contempt perhaps the most serious of all the items in which I was engaged, because they were, as I recall it, had in the contempt case.

In one of those I am charged with having argued—I am referring to paragraph 17, if the Court please—and in that case I made an objection and said that the question was argumentative and not based on facts in the record, and at that point the Court asked me, or the Court noted that several times that morning I had broken his rule about stating grounds for an objection, and had I done it deliberately? And I replied no, I had not, that this business of stating grounds for objection was a matter of habit of 25 years, and that on occasion I had lapsed, and I believed it was something the Court had been accustomed to as a matter of habit when he was on this side of the bench.

Now, actually, that item is charged here now as one that is causing delay. It is a one-sentence objection. The Court said I had done it several times that morning, and

Transcript of Hearing of December 31, 1950

I went back to review that morning's testimony and found—this was on cross-examination of one of my witnesses by the Government—and found that I had objected a total of approximately 43 times in the course of that morning; that three times I had said more than "I object" or "I object to the question," and only three. One time I said, "No foundation laid"; the next time I said, "Argumentative," with perhaps another short explanation; and the third time is the time which is alluded to in the incident set forth in the petition.

Now, these are brought here as signs of unfitness to practice law; they are brought here not only as items in the contempt but brought here to show proof of the concerted effort to obstruct and delay. The sum total of my contribution to delay, if I can call it that, in that morning because of that incident or these incidents was about six times of record, as against the numerous times when I remembered the Court's inhibition and said merely "I object".

Now, Mr. Adams said that repeatedly and repeatedly other counsel joined in the objections. I picked this morning out not because I desired to but because Mr. Adams brought it in, and in the 43 objections I made because my witness was being cross-examined; not one other counsel made an objection.

Now, if this were a pattern, if this were a habit, if this were done repeatedly and repeatedly, then that situation would not have developed that morning as I have described it.

And one thing we ask the Court to do is to take all these instances culled from the record and brought to the surface and place them back in focus, place them back where they belong in a nine months' trial—

Transcript of Hearing of December 21, 1950

The Court: That is why I wanted that concordance.

Mr. Isserman: —and then your Honor will see that as against the relatively few occasions when these things took place, that day after day, witness after witness, question after question went on in a normal fashion.

I think here there is some need for quantitative analysis as well qualitative analysis. Mr. Adams stands up and says there are 70 incidents of a particular nature. Well, of course, we will analyze these incidents and show your Honor that most of them do not bear out the charge at all of conspiracy to obstruct or delay, nor even of any improper conduct no matter how slight. But when the number is considered in relation to two factors—perhaps three—the length of the trial, the number of counsel, and the complexity of the issues involved—and there were novel issues—this was the first major trial on what Professor Chaffee calls the first peacetime sedition act—when these factors are considered, then your Honor will see that these individual items pulled out of context do not rise to the dignity either of misconduct of any kind, and certainly not as proof of a malignant conspiracy in this case.

Now, I would like to allude for a minute or two to the same problem which has been mentioned here of joint action, and from a slightly different angle. Certainly in a conspiracy trial joint action by counsel is desirable. First of all, it leads to no inference of improper conduct, and secondly, it is conducive to expeditious handling of a trial. It is conducive to expeditious handling of a trial expressly in this case. The defendants were members of one board. They were members of the National Board of the Communist Party, and, in effect, tried as such, so that there were no conflicting interests between them, but their interests needed separate counsel because of particular evidence that might come in against particular individuals as against the collective group.

Transcript of Hearing of December 21, 1950

Now, Mr. Adams said in passing we had a joint office, and seemed to suggest that was invidious. Assuming for a moment we had not; assuming for a moment we wanted to obstruct the trial, your Honor, and each counsel working out of his own office, each counsel drew his own papers, drew his own motions, drafted them as he felt he should draft them instead of struggling with his associates to get a common draft, the Court would have had to read instead of one set of papers maybe six sets of papers; and throughout the case the very fact that this concerted action tended to expedite rather than to delay the proceedings and tended to simplify them.

Mr. Adams says here, as an evidence of guilt presumably, that the summations were divided as to subject matter.

Well, why not? If they had not been there would have been charges of repetition. The arguments which could be prepared out of court were divided as to subject matter. Motions were made not by six persons but by one or were split up.

So whenever it was possible, because of joint action and because of this kind of case, to expedite matters, it was done, and the record is full of instances of this kind. It is rare that an attorney stepped out and acted on a motion by himself unless perhaps it affected only his client.

Now how much time was saved, how much expedition resulted from that kind of procedure is speculative, but certainly it looms up large against miniscule matters such as Isserman getting up and Isserman being argumentative, and such as the charge of delay and obstruction.

If we pursue that argument a little further your Honor will find that on the cross-examination of the Government's witnesses where each counsel representing different defendants had a right to cross-examine that witness, with

Transcript of Hearing of December 21, 1950

one or two exceptions one counsel cross-examined. If six counsel had tried to do it and if Dennis, a layman, had tried to it, your Honor can see what confusion would have resulted. Not that properly as a matter of legal right they did not have a right to do it, but nevertheless confusion would have resulted in trying eleven persons in a trial of this kind. But that was not done.

When it came time for the presentation of witnesses on behalf of the defendant a witness was presented and one lawyer handled the witness, not two or three.

So if we again look at this charge, so far as delay and obstruction is concerned, so much was done in a positive way conducive to expedition which negates from the record itself the idea that these little items one by one add up to delay because they do not, because in their totality if they be physically added up they will not be found to amount to substantial delay in this trial.

The Court: Mr. Isserman, would this be a convenient point in your argument at which to take our mid afternoon recess?

Mr. Isserman: It would be, your Honor.

(Short recess.)

Mr. Isserman: May I proceed?

The Court: Yes.

Mr. Isserman: If your Honor please, while we are on this matter of objections, I think it might be well to revert for a moment to the ruling of the Court in respect to objections. One is apt to get the impression from what has been said that the Court had ruled that only one counsel could object because the benefit of the objection would go to all. The Court's ruling was not positive in that sense. What the Court said was this:

Transcript of Hearing of December 21, 1950

"No, I did not say anything about the way objections should be handled. I merely said that where one man objects, all the others will have the benefit of an exception. I did not say that the others could not, if they desired, object also."

At another point the Court said:

"I do not say that you may not arise and say that you take or join in the particular motion or join in the exception. You may do so if you desire."

Many of the cases which show what I will call multiple objections—that is, objections by more than one counsel—show the second counsel got up to state additional grounds. You can see the difficult case counsel had when they are seated at a counsel table maybe three times the length of this on, six counsel spread along, the defendants behind them, and associates on the lower end handling exhibits in this matter, and one counsel examining out near the jurybox. Your Honor can see the physical difficulty of consultation on any point in the courtroom without taking a recess. Recesses for that purpose were very few. Not many were asked for. Not many were given.

So that where counsel had to confer quickly to get all the grounds they wanted to state, one counsel would get up and object and another counsel would get up and state his grounds. If one counsel felt they were not sufficiently covered, he would get up and state his grounds.

Many of the incidents cited here were incidents of that kind, where very briefly counsel stood up to supplement or add to an objection, and it is the thing done in every joint trial I have ever heard of or been connected with. I was going to say unless there is a chief counsel that

Transcript of Hearing of December 31, 1930

has that function. In this case, there was no chief counsel. There was not a joint representation of all defendants. Each lawyer had separate defendants. Each day there was a stipulation entered into, but there was no one person who could say or who had the function of addressing the Court on objections.

So I would say that the fact that there are relatively few multiple objections, and they are relatively few considering the thousands of objections made here with no other lawyer participating, is evidence of restraint on the part of the lawyers rather than evidence of seeking delay through that laborious method.

I would also like to indicate that the Court believed all objections were causing delay. At one point in the record a question was asked by Government counsel: "Q. Did Betty say anything about that session after she quoted from it?

"Mr. Sacher: Just a moment, I object.

"The Court: Overruled. And I may say, Mr. Sacher, that I have observed lately some disposition to do what I thought was to delay the proceedings here, and I am contemplating the taking of some steps to expedite the case.

"Mr. Sacher: Does your Honor make that observation in light of objections made to questions asked?

"The Court: I do."

So that here there was a simple objection stated and yet it brought forth a rebuke from the Court.

Again I would like to refer to an incident which the Government brings here, not the respondents, as a charge against the respondents, one of them being myself. I refer to volume 3 of the printed record, page 2276. At that point

Transcript of Hearing of December 21, 1950

the cross-examination of a witness had been curtailed by the Court, and I was doing the examining at the time, and I had received certain letters from the clerk's office on which I was going to question the witness, but examination being curtailed, I still had the letters in my possession and the Court says:

"I want them. Give them to me.

"(Handed to the Court.)

"Mr. Gladstein. I desire the record to show the tone of voice in which the Court demanded them—

"The Court: Yes, you can put all the tone of voice you want in.

"Mr. Gladstein: May I finish?

"The Court: Because we are pretty near the end of this challenge.

"Mr. Gladstein: Your Honor, I would like to finish my statement for the record. I wish the record to show my objection to the tone and the manner in which the Court delivered that command as unbecoming a court, and I object to it. I also—

"The Court: There is nothing unbecoming about it. I am through being fooled with in this case.

"Mr. Gladstein: Now, if your Honor please—

"The Court: If you don't like it you can lump it. Put that down."

Then here is my wrongful conduct:

"Mr. Isserman: I object to your Honor's remark and characterization of the conduct of counsel, and I ask that your Honor strike that remark.

"The Court: Oh, yes, yes, I have heard all that. Now I am sick of it."

Transcript of Hearing of December 21, 1950

Now, these objections on my part, which I was in duty bound to make, and that I would make every time a court talked as it did here in language I never heard of a court before, my making that simple objection is charged as an act of criminal conduct on my part.

I might say, your Honor, this is not the exceptional incident. Again I must use the language that again and again the very incidents that the petitioner relies on are incidents of this character. I think another understanding of the difficulties we labored under—and again I wish to conform myself to the statement of Mr. Sacher that we are not here trying to appeal from rulings in respect to our assignments of misconduct against Judge Medina—but I think again you cannot consider what we did in a vacuum. Certainly on the question of fitness, the relationship of court and counsel has a bearing. No two hearings have the same tone. The tone depends on the temper of the court, on the nature of the issues, on the temperament of the lawyers. Some lawyers have stronger temperaments than others. Some judges have senses of humor in which they like to indulge. Some are very talkative, some decry talking. Very often, the conduct in the court is the reflection of the pattern worked out by the counsel and the court.

In this case, your Honor will find time and again in the very incidents where we are charged with insubstantial arguments and repetitious arguments that the Court said, "You may argue in extenso." Or the Court would turn around to counsel in the very incidents in which it charges misconduct and say, "Do you want to be heard too? Go ahead." Then something would be said. The Court would answer and the colloquy would go on. Certainly counsel had a right to infer that it is with the consent and acquiescence of the Court, because the Court participates in it. I think in one instance Judge Medina said he liked colloquy

Transcript of Hearing of December 31, 1950

and he liked to relieve the tension of a trial and so on. So these matters, which you will observe as your Honor goes through the record, will have a bearing on how to evaluate certain incidents.

At the time Judge Medina stated that he felt Mr. Sacher's merely objecting was causing delay, he went further and said:

"My purpose is to indicate, as I said, that I have observed a number of things here which have impressed me as having been done solely for purposes of delay, perhaps to drag out this case for an indefinite period and before I do anything further than what I have already done in that matter, I thought it well to give counsel some warning because it is the conduct of counsel that has caused me to reflect on the matter, and so I have given this indication.

"Now, for example, I have observed as to exhibits, that an extremely long period is taken for the passing around of the exhibits, turning them over and over and passing them around, and 20 minutes or a half hour go by; and it seems to me that perhaps we can be a bit more expeditious."

There are two or three or four incidents, charges of misconduct, in which counsel makes some observation in respect to the books or exhibits. I ask your Honor to consider the introduction into evidence of a book of 400 pages or a pamphlet of 30 pages or an article even of nine finely integrated pages. I have one in mind, in a political magazine, an article on a political subject, political theory. It is offered by the prosecution. The rule in existence was that the prosecution could select any portion of that exhibit and read it, whether it be one line as often happens,

Transcript of Hearing of December 21, 1950

three pages or the whole exhibit. As the prosecution finished reading it, the defense could avail itself of the opportunity to read whatever they felt of that exhibit would explain or modify or supplement the reading by the Government. Again the long counsel table. A copy of the exhibit is handed to us or it is identified so that we can find it among our books if we have it. It is passed from counsel to counsel. Each counsel has two clients behind him. Very often a difference of opinion arose as to whether anything should be read or part of it should be read or none of it should be read. No recess was taken to make that judgment. It was done by a passing of the book or pamphlet along the table, quick consultation, from whispers, from passing of notes, and one person would get up and speak or not speak, and generally speaking one person would read, or no reading would be had, or the reading would be very short.

Let us assume it took 20 minutes or half an hour. We have six counsel. That is five minutes apiece. There was a need of consulting with clients behind them because on this political theory, the clients had to advise as to what they felt should be read under the circumstances. So assuming it would take half an hour, on occasion it was necessary because of the nature of the trial, the nature of the exhibits, the lack of opportunity to confer as you do when you have one client sitting next to you, and the need of reaching a quick, common decision—and there were thousands of exhibits—and in most cases of that kind, one person would handle it for the defense after this reading took place.

We are charged with improper conduct because the Judge puts on record that it took us 20 minutes to look at exhibits. On another occasion charged against me, the Judge said, "Let the jury look at these exhibits." I think

Transcript of Hearing of December 21, 1950

one of them was the history of the Communist Party in the Soviet Union, which is a very comprehensive book containing philosophical material, dialectic materialism, and a number of similar things. He said, "Let the jury look at them for a moment." The jury looked at them for, I would say, maybe three minutes or ten minutes, and I said, "I would like to show the jury had all these books for ten minutes and could not have read them all." The Court said, "I will allow your statement to stand," and so on, and we went on.

Certainly in view of that kind of cursory examination of these books, it would not—it was not the binding that the jury had to examine, it was the contents, I could appropriately suggest there be noted on the record the time the jury was looking at the books.

There was no rebuke at the time as I recall it, but now I find I am charged here with unfitness to practice law because I made that suggestion.

I think even more sharply, at one point, a witness was sitting on the stand—this again is brought in here by the petitioners—and he was testifying about a convention which occurred in 1944, and he had in front of him the proceedings of that convention which had been marked in evidence. I didn't know if the witness was reading from that exhibit or not, but he was testifying on the matter contained in it, although testifying from his own recollection. He had not exhausted his recollection. I said, "May it be noted that the witness has the exhibit?" I said, "May it be noted what page the exhibit is opened to?" This was denied. I don't quarrel with the ruling, but I do have to stand here and say when that is brought into this courtroom now as an example of unfitness to practice, some loose standard is being projected here which I know this Court will reject,

Transcript of Hearing of December 21, 1950

These are from the 74 items Mr. Adams talks about. These last two I mentioned are part of the 74 items, but you can get quantity by going through a record and picking out that kind of trivia on a charge of unfitness to practice law. It is said here that all these things somehow have a different quality and warrant the severe action of disbarment in this proceeding.

Of course it is impossible here to go at length into many of these subdivisions or into particular instances. I have given your Honor some.

Now there was some occasion during the course of the trial when requests were made for time, if the Court please. I recall when the Government's case ended, the Government rested at about 3.15, rested abruptly, I was out of the courtroom and Mr. Crockett was out of the courtroom, I think. There was a short recess. When I came back I informed the Court that I had been working on the very motions which were to be made at the end of the Government's case. There were four to six thousand pages of testimony, there were hundreds of exhibits introduced in the two months period during which the Government had been presenting the case. At the end of a recess at about 3.30—we usually sat till 4.30—counsel asked for some time in order to prepare these motions for summary judgment and dismissal of the action and argument thereon. The Judge had previously indicated that he would reserve decision on these and reserve the argument, and on our application for time the Court refused to give additional time. He said, "You will start now and complete by 4.30 and you will start with your first witness tomorrow morning."

When I came into the courtroom I asked the Court to reconsider that ruling, and I am charged now with delay although the Court made it clear that I was arguing on my own time, whether it was a minute, a month or a day,

Transcript of Hearing of December 21, 1950

"but you are arguing on your own time. You won't get it; you can't persuade me." I told the Judge that I haven't got the motions prepared, I haven't got the motion papers, and the Court said, "You are fluent; do it orally." And before 4.30—Mr. McCabe started—and at some point very close to the end of the court session after the Court said there was nothing to argue I remember the colloquy with Mr. Dennis in which he said, "There is nothing to argue. It is just like a man found with a smoking gun by a dead body. There is no issue." And in the course of the colloquy he said to Mr. Dennis, "Go ahead. Go ahead and call me some names," because Mr. Dennis had said in the course of the colloquy that this was not justice. There was an invitation to call him more names, and finally—I will say there was persistence, persistence in asking for this additional time, and when I started to discuss the question of clear and present danger, the Court said, "Now I think you have got something. I will hear that tomorrow," when there were some other matters that he said he would hear tomorrow morning, and the next morning was spent in argument and our presentation of the defendants' case was started on Monday.

Now there was persistence there, but persistence within a framework of proper advocacy, persistence because of a need in the defense of the clients. There was two months of testimony by the Government, numerous motions were made, and I didn't have them quite ready. I didn't want to present the argument because we felt that the case should not go to the jury because constitutionally it was not properly brought, a point which was again argued before the Supreme Court, and we felt here we had a right to try to persuade the trial judge of these issues. And now these incidents are brought forth as incidents of improper conduct.

Transcript of Hearing of December 31, 1950

I call your Honor's attention to paragraph 14-f of the petition which is a charge that counsel urged one another to badger the Court. I never quite knew what that meant, and the only reference given is at one point the Court said counsel are badgering, or using some language to that effect. There is nothing that you can come to grips with. There was one point that I can see where the Judge said, "You are egging each other on now." But we were further away from the bench than we are now. There was this big, long table. We had to confer with each other in order to expedite the proceeding. We had to determine, for instance, if one lawyer was examining we had to give him notes on other questions we had in mind. So that, naturally, there was movement, naturally there were goings on, but to sit from this distance and to say, "I can see you are egging each other on" is a conclusion which couldn't be borne out by the facts and is not borne out by the facts. This statement of badgering is one of these adjectives or participles or phrases which find no substance in the actual things done at the counsel table.

Now under 14-g it is here charged that the respondents repeatedly made charges against the Court of bias, prejudice, corruption, impartiality.

We have looked through the record, your Honor and we find no statement that the Court was charged with corruption. There just isn't any.

There are some occasions when the Court says, "You have charged me with corruption," or "Go on and charge me with corruption," but there is no statement in this record where any counsel, where respondents or other counsel charged the Court with corruption.

If my memory serves me right the only time I remember the word being used was when there was a characterization by one of counsel of the jury system, that is,

Transcript of Hearing of December 21, 1950

the selection of jurors being corrupt. But there was absolutely no charge of corruption on the part of the Court, and if there is we ask Mr. Adams to bring it forward now.

Mr. Adams: You mean right now? I would be glad to.

Mr. Isserman: If you have a charge of corruption from one of the respondents I would like to hear it. I haven't found it.

Mr. Adams: Does the Court care to hear me?

The Court: Yes.

Mr. Adams: Mr. Sacher's remark: "Let's see whether I get equal treatment with Mr. McGohey."

That is a charge of corruption on the part of the Court. That is a charge of an agreement on the part of the Court to favor the prosecution over the defense. That could only be corruption.

Here is another one: "Mr. Sacher: Now, I must in all candor say that it is very difficult for us among the defense counsel to believe that the United States Attorney was caught unawares in the request or the direction which the Court made to him to proceed with his proof on an hour and a half's notice."

That, your Honor, happened on February 11th. The Court advised counsel with respect to the delay in the challenge proceeding, told them they would have to submit a memorandum on the 14th, and the United States Attorney knew that if that memorandum was found insufficient he would have to go ahead. But notwithstanding that there was no hesitation in those words they charge "that it is hard for them to believe that the United States Attorney was caught unawares." If that isn't a charge of corruption, if that isn't a sinister bargain charged almost in so many words, it is hard to think of anything more clear.

Transcript of Hearing of December 31, 1950

Mr. Isserman: If the Court please, these incidents, in our opinion, fall far short of charging the Court with corruption, unless it is some other matter in the record not set forth here which would indicate the charge of corruption.

Now we come to 14-h where counsel are charged 24 times with making disrespectful, insolent and sarcastic comments to the Court. Actually, only five of these took place in a seven-month trial proper, as the evidence shows, after the jury was sworn, and the other on the challenge transcript. So you have four of these alleged remarks to counsel over a period of nine months, and only three of those were charged to the respondents.

Now, I would like briefly to allude to what these three were. One of them is the subject of a contempt charge. We were discussing the problem of the composition of a neighborhood from the standpoint of available jurors, and Congressman Marcantonio was on the stand, and I had asked him some general question about the intelligence of jurors, and I think there was objection, and the objection was sustained, and a discussion ensued on that point.

I said to the Court that if this were a small community, if this were a small community, we could call the individuals, as has been done in other communities, but because this is a large community in order to show available jurors we cannot call them but we have to fall back on some secondary evidence; and at that point the Court said, "You will not call all the persons in the community."

My statement was "If it had been, if New York City were a small community."

The Court then ruled, without my even suggesting that we would call everyone, because this was a large community, that he would not under any circumstances allow the calling of jurors, available jurors, or to show the avail-

Transcript of Hearing of December 21, 1950

ability of jurors in the community, to allow the individual voters to be called.

I, of course, made no such suggestion.

But I then proceeded to establish that point by secondary evidence, and I thought a Congressman who knew his constituents could come in and make his statement as to the quality of the voters in his district, as a secondary method of proving that which would be too difficult to prove in primary fashion.

And at that point the Court made some reference back to the point that I had wanted to call all of the jurors; and I said, "I am sorry, the Court is misconstruing my statement." I was in the middle of an objection, and the Court interrupted and misconstrued my statement, and the Court said I was impertinent for saying it was a misconception, and ended up by saying "when you charge me deliberately with misconstruing." I had not charged the Court with deliberately misconstruing. I had called attention of the Court to the misconception which had occurred so I could go on with my argument, and, in fact, there was a misconception, as the record shows.

Now, this is one of the disrespectful and insolent and sarcastic comments which I made to the Court, which I had to make in order to carry out my argument, because I had not said I would call them, and the Court said I did. I had said if it were a small community I would have called them.

Well, these things happen every day, your Honor, and certainly there is nothing invidious in a remark to the Court that the Court has misconstrued a statement when, in fact, a misconception has occurred and it is necessary to explain it to proceed.

Then there is what I call the Social Register incident listed under that, and that is a subject of one of the six contempts of which I was found guilty.

Transcript of Hearing of December 31, 1950

A witness, Reverend Darr, was on the stand. He had run for office in the Seventh Assembly District, and he was being questioned about the composition of the neighborhood from the standpoint of racial minorities and the people of wealth, and so on.

After he was through, the Government cross-examined him not on the issues concerning which he testified but on membership of Reverend Darr in various organizations. I think one was the American Youth for Democracy; and an objection was made by counsel to this line of inquiry because it did not go at all to the testimony of the witness, and there was no effort to cross-examine him on the facts which he had adduced.

But at that point in the course of the argument, colloquy which went back and forth with the acquiescence of the Court, the Court participating, Mr. Sacher said it is no different than, or it has no more bearing on the case, Mr. Darr's membership in a particular organization, than the fact that Judge Knox was the secretary of two large organizations; and I added "and that your Honor is in the Social Register."

Now, again we have to look to context. Judge Knox had been on the stand. This matter of the corporations—I am not sure if that came up before or not—but some thousand or more pages back the Social Register had been introduced in evidence, and at that point—I think I remember it without looking it up—at that point Mr. Gladstein, as he offered the book and it was accepted as relevant, said, "Your Honor is in it too." And I think the Judge smiled and said, "I knew we would get to that."

And then Mr. McGohey said: "Am I in it?"

And Mr. Gladstein said, "Haven't you read it?"

And Mr. Sacher said, "If Mr. McGohey has not read it he is not in it."

Transcript of Hearing of December 31, 1950

And everybody laughed and we went about our business.

Now, with that in mind, the fact that the Court was in the Social Register, was a matter of record fact which had been humorously treated, and I added a few words—"or the fact that your Honor is in the Social Register."

I did not bring this into the courtroom. It was there. Perhaps it was not a happy choice of an allusion to show the irrelevancy of Reverend Darr's membership in a particular organization, but is that, again, a four-line statement, one which was calculated to obstruct this trial? Was that four-line statement one which contributes to delay in this proceeding? Yet it is brought here for that particular purpose.

The Court will find that when these alleged insolent remarks are examined, that they fall short of the quality which the words at the beginning of the paragraph give them. In many cases they are not insolent; they are not sarcastic. Sometimes they are so characterized by the Court, and sometimes they just are passed by, and this is one thing I think this Court will undoubtedly be interested in, that many of these incidents went by without comment from anyone. They just went on in the course of trial and were accepted as routine. No comment by the Court that they were improper; no objection by the prosecution that they were improper; but the record was culled later, and they were brought forth as examples of one thing or another.

Now, I am sure if every trial record were examined that way, post the event to see how counsel conducted himself, every counsel would hope that he could try certain parts of it over again, as I would want to retry or restate or reargue the incident concerning Reverend Darr. If I had expected these consequences I would not have said "or the fact that your Honor is in the Social Register."

Transcript of Hearing of December 21, 1950

I might say with respect to this incident which is described as the most serious contempt of mine, that if I were doing that over again I would have gone to the counsel table and sat down and remained seated until I made sure that the Court was ready to have me proceed again.

That was a situation in which a young colored woman of Chicago was on the stand, a Mrs. Lightfoot. And I ask the Court specially to read her examination by this respondent from the point it started that day until the time that incident happened, and I ask that because I believe that it will give this Court a picture of the stress and strain as a lawyer that this respondent was laboring under, and I say your Honor can get it from the record when you get to this point when the matter flared up.

It did not start one line or two before, but it started with the beginning of the calling of this witness.

Then she was testifying from an outline under the greatest difficulty, and I asked her under this heading was there a discussion—the heading was called “The Strategy of the Workers”—Exhibit 7 x W—and I asked her:

“What did you discuss under that?”

And at that point the Court took the examination away and asked the question which caused the difficulty, and here is the question of this young Negro woman:

“Q. Mrs. Lightfoot, in this matter of the strategy of the workers did you discuss the dictatorship of the proletariat, imperialism and just and unjust wars and things of that kind, or were they not mentioned?”

Now, I know if I would hear this question I would object automatically because it does not ring to me as a question which is legally proper. And I would say in addition to the

Transcript of Hearing of December 21, 1950

fact that I considered it then an undue interference with direct examination, and that no foundation had been laid for it to show that there was such a discussion, and I was beginning to lay a foundation of what the discussion was, and the question was compound; it brought in a number of subjects not necessarily intended to be covered at all as part of the examination, and it was also in a disjunctive, and also used as a vague and indefinite expression—"and things of that kind."

Now, a yes or no answer to this question to me is an impossibility, and I say under the harassment of the moment I perhaps objected too strenuously, but I did object to it, and the Court overruled the objection, and the Court said: "You will answer that question yes or no or state that you cannot answer it."

And then Mr. Gladstein objected to the Court's tone and manner of badgering the witness.

The Court said: "There is nothing about my tone, and you will please sit down."

And then Mr. Gladstein said: "I desire to make an objection."

And the Court said: "Mr. Marshal, will you just—

"(To the reporter) Read the question to the witness.

"We will have no more monkey business here."

And Mr. Gladstein said: "I object to the ruling."

And I said: "I object to the Court's remark."

"The Court: You will sit down, Mr. Gladstein."

And I said: "And I want to register an objection to the Court's ruling."

Transcript of Hearing of December 21, 1950

And the Court said: "Very well."

And I said: "As prejudicial to the conduct of the case and to the defense and making the defense impossible."

And the Court said: "When I desire to ask a question, I am going to ask it. I am through with the interference of counsel."

Now, I do not know of any new rule, but my impression always was that a question from the Court, as far as its legal relevancy is concerned, has no greater weight than a question put by the prosecution; if the question is irrelevant or improper, or disjunctive or compound, as the case might be, that counsel has the right and duty to object just as if the prosecution were asking the question. If I am wrong on that then I was in very serious error here, but I do not believe I was wrong.

Then the Court said: "Now go ahead and read the question, Mr. Reporter."

And the respondent said: "May I ask the Court a question?"

And the Court said: "You may not."

And my question would have been may I not object to that question, which is obvious from the record. And the Court said: "You may not."

And then the question was read, and I objected to it, and the Court overruled the objection, and the witness started to answer it, and all she said was: "Under C I discussed—" and C-1 was the outline number of this lesson—and that is as far as she got.

The Court said: "Mrs. Lightfoot, did you hear me tell you to answer that question, either that you did discuss those subjects or that you did not discuss those subjects? Now which was it? You did discuss them or you did not discuss them."

Transcript of Hearing of December 21, 1950

Here we have a multiple of subjects with all the vague aspects I pointed out, the compound aspects, and the question again is being pressed for an answer yes or no.

I objected to that question, and the Court overruled it, and Mr. Gladstein tried to speak, and the Court overruled it. He said: "Overruled. I don't want to hear anything from you, Mr. Gladstein."

And then the witness said: "The way that the question was—I heard the questions. It says—"

And then the Court said: "Then you will answer it the way I tell you to, Mrs. Lightfoot. Now did you discuss those subjects or did you not?"

The witness said: "The question includes 'things of that kind,' and—"

And then the Court said: "Then I will take out 'things of that kind.'"

And then the witness said: "May I hear the question?"

And then the Court said: "I will give it over again."

And the Court reforms it somewhat.

And then the witness said: "Well, were they mentioned during the course of that discussion, is that what you are asking me?"

And the Court said: "Well, I suppose that word 'discuss' has some peculiar meaning in the Communist Party—"

At that time I objected to that characterization, and there was a reason for it because throughout the trial the Government had taken the position that the Communist Party was using Aesopian language, and that things did not mean what they say. So that when it was brought before the jury again that the word "discuss" has a peculiar meaning to the Communist Party, it was driving home, necessarily, whether it was intended or not, it was driving

Transcript of Hearing of December 21, 1950

home to the jury the use of special meaning to words which would give force to the argument of Aesopianism which had been made an issue in the case.

Then the Court said: "I will reform my question."

Then the Court said: "Did you mention to the class in that lecture the subject of the dictatorship of the proletariat?"

And the witness said: "I didn't mention it at that lecture—"

And then I interposed an objection—the witness had started to answer—and the Court said:

"Mr. Isserman, I am not going to have any interference here. Now will you just go over there and sit down and then you can say what you want to say afterwards."

"Now Mr. Marshal, just escort Mr. Isserman over to the seat."

I said: "I would like to make an objection to your Honor's question. Am I allowed to do it?"

I said that because once I was seated there was the need of rising to make the objection, and, also, as the examining attorney, my place normally would be over just beyond the jury box, and I was not through with the examination of this witness.

So at some point after I sat down I rose again, and I said: "Well, I rise now to object to your Honor's question."

And I sat down again.

And the Court asked for a direct and responsive answer, and I objected to the question, and it was overruled, and again I was shown to my seat, and I said:

"May I not stand at this point?"

Transcript of Hearing of December 21, 1950

And the Court said: "You will sit right down. I have had enough contemptuous conduct from you and I am not going to have any more."

And I said: "I am not aware of any contemptuous conduct."

And the Court said: "Well, you will be aware, all right."

And I said: "I would like to object to your Honor's remark and I move for a mistrial because your Honor has made the defense impossible."

And the Court said: "Mr. Marshal, get busy."

And then I sat down.

And then the Court sustained the objection to the question.

Now, the argument is made that all this was done not for delay or obstruction, but to prevent the Court from eliciting the answer to the information which I, as counsel for the witness, was seeking to bring out. I never got to the point where I could ask this witness what did she discuss on this subject, and as far as the particular question was concerned, she had said that she had not discussed this question of the dictatorship of the proletariat.

So the Court's answer is found in the record, but the answer that the respondent wanted of the nature of this discussion in this course never was adduced; and shortly after that, the three or four lines which follow, I had to continue the examination; and I said: "May I stand up?"

And the Court said: "Temporarily."

And there was laughter in the courtroom. And then I continued with the examination.

Now, I say that if your Honor considers the fact that this was a trial which had started in January, and this was August, this was mid-summer; the witness had been

Transcript of Hearing of December 21, 1950

on the stand for some hours, the examination had been very, very difficult from the standpoint of a lawyer, and I had a feeling that I had need to protect this witness, and I tried to protect the witness; and I say that looking at it now, and looking back at it, if I had gone over and sat down and waited until things quieted down, perhaps there would have been less of this colloquy between myself and the Court, and the marshal, as to whether I should sit or stand, because I was bound in there between two conflicting positions, one to sit, and two, to stand to object or to question. And apparently I started to rise too soon to continue the examination, and I was compelled to sit down again.

Now, that may be reprehensible conduct, looking at it now, and it is conduct for which I have been punished, although, as your Honor knows, we have an appeal pending from the contempts. But, certainly, it is no part of this conspiracy to obstruct or delay the trial. Certainly, this incident which arose out of that moment was not the result of Mr. Sacher sitting at the counsel table if he were in the courtroom at that time, or any other counsel sitting at the counsel table. That incident was my responsibility and mine alone, and I reacted in the circumstances out of the experience that I had as a lawyer and also out of the exasperation that I felt at the moment under the circumstances of the difficulty of the examination that I was trying to put the witness through; but you can't evaluate this as a conspiracy or relate it to a deliberate attempt to provoke the Court.

Now, Mr. Adams said it happened again and again. It happened once, your Honor, as I have said before.

Now we come to a paragraph which deals with the disobedience in whether or not to argue without permission

Transcript of Hearing of December 21, 1950

and to desist from argument. There are 74 incidents, 14 of those by this respondent.

Of course, we can't analyze them here and I won't try. In many cases, however, permission was granted. The very incidents brought in by the petitioner in this case show that this disobedience was not disobedience because in the very incident permission was granted.

I think this should be said about the rule about not stating grounds and about not having argument, that, first of all, it is ingrained in trial counsel, as your Honor undoubtedly knows, to state grounds for objection, because if you do not state them you do not protect your appeal, and, besides that you are supposed to state them to the Court so the Court can determine the value of the objection and perhaps be persuaded by the grounds you urge. And this matter of no argument was not uniformly kept up by the Court either for the prosecution or for the defense. So there were times in that morning when I twice said "No foundation laid" and "argumentative," and nothing was said by the Court; and the third time I was charged with doing it with deliberateness and wilfulness, and so on.

Very often argument would start. The Court would start it. The Court would invite it, and counsel would participate, and the Court would say, "Now you are arguing."

Now, your Honor will find the unequal application of this—not unequal from the standpoint of favoring one side as against the other—but sometimes it was enforced, sometimes it was not enforced, and sometimes discussion was invited, and many of the incidents which are presented to your Honor on this subject were incidents in which it is clear that counsel had no feeling that they were violating any rule. The Court did not treat it as such, and some-

Transcript of Hearing of December 21, 1950

times the violation of the rule is charged when an objection is being stated, or an objection to some remark of counsel or the Court in respect to trial counsel.

And whereas it is true that an objection on a record, under the Court's rule—which was not a hard and fast rule—redounded to the benefit of all, it would seem to me when the Court characterized this conduct of counsel, that counsel is under a duty—and remember, this is before a jury—that each counsel is under a duty if he believes the rebuke or castigation is unmerited, to take exception to the remark, because when this is done time after time and you keep quiet the effect on a jury is devastating. Your Honor knows that very well.

So that in those instances if counsel got up to object, it was not only a thing they had to do themselves if they had any integrity, but they also had to do it to shield their client as much as they could from any animus from the jury because of this charge of misconduct of counsel.

It was a very difficult problem to keep the trial going with all these warnings of the Court, and your Honor must know if we could have helped the situation in the light of the Court's warnings we would have done it, because it had a devastating effect on the jury; but we had the problem of trying to put our case in under the theory that we believed was the theory of the case, in which there was very sharp disagreement, it is true, and in doing that we ran into situations on occasion, and certainly with warning you would think a person would desist. They would desist if they could, but if the warning went to the fact that you objected to a simple question, as in the case of Mr. Sacher, then you either had to sit still and not represent your client, or persist at your peril.

And I certainly conceived it my duty as a lawyer—and I have said that to the Court on a number of occasions

Transcript of Hearing of December 21, 1950

in the language that lawyers use, that whenever I felt that the Court was making a remark which I thought was injurious to my client or to myself, that I would object to it. Whenever I felt that an objection should be made to a matter before the Court I would make it. Whenever I felt that a matter on occasion should be pressed for acceptance, I would do it, because that is part of litigation.

That is how truth is arrived at, that is how decisions are made, because a court should be opened to persuasion by counsel. Not that the court should always be persuaded, but a court should be open to persuasion and in this case it seems the persistence resulted in positive action.

I mentioned one which occurred at the close of the Government's case but I would like to mention one more. Again an incident which is brought in here as evidence of improper conduct on my part and Mr. Sacher's part.

This was a request for a reconsideration of a motion for the taking of the deposition of William Z. Foster, who was the leader of the Communist Party. He was very ill, the trial had been severed because of his illness, and we suggested that written interrogatories be propounded and his answers taken at some convenient place and time so that his health would not be seriously affected. We made this motion for reconsideration immediately after the opening of Mr. McGohey. We brought in new matter, not only that Mr. Foster was the leader of his party and knew these subjects which were the issues of the trial, but that Mr. McGohey had in his opening to the jury stressed the importance of Mr. Foster and his writing and his works in connection with the Party, and a crucial issue developed around a letter which Mr. Foster wrote which was being referred to in the openings. We said on the basis of this opening we need Mr. Foster and we did argue it and at the

Transcript of Hearing of December 21, 1950

end of the argument the Court said, "No matter how much you will argue, my mind is made up. I will not allow this deposition."

The matter was opened and argued and finally some months later the Court said, "I now rule that you may take the deposition of Mr. Foster." If we had accepted the Court's ruling and not moved for reconsideration when these matters came up, the deposition would not have been taken. The fact is it was taken. It is in this record and your Honor can see the weight and value and scope of it.

Finally the deposition was read to the jury.

For that persistence—it was not undue persistence, it was not unlawful persistence, but it was persistence—and for that persistence which ultimately resulted in a change of ruling on the part of the Court, we believe a salutary change, we are now charged with unfitness and also in this dual capacity this is an item which is claimed made for delay.

I might say the deposition of Mr. Foster came from the respondent's side. Special counsel was retained to do it so that the trial went on. Mr. Foster was examined for an hour or two in the country with no delay in the trial whatsoever. That was the proceeding we had suggested to facilitate the taking of the deposition.

Now under 14j and k, if the Court please, I think perhaps the qualitative argument is best here—I mean the quantitative argument.

It is charged that we disregarded rulings on evidence so as to place matters before the jury which were ruled out. There are 22 incidents in the whole trial.

I might say in passing that Judge Medina remarked early in the trial that he used leading questions in his day or some such remark in passing on this problem of leading questions.

Transcript of Hearing of December 21, 1950

Now out of these 22 incidents, four of these occurred before the jury was drawn, so I would take it that these are erroneously listed. That leaves 18. 18, your Honor, in a trial, in a jury trial, which started March 7th and went through into October with six counsel—five questioning, five counsel questioning witnesses. They were actually culled out of this record, 18 instances of leading questions in a matter of that kind, a matter of less than three apiece per counsel in over seven or eight months. Not a week or a few days, but a long drawn-out trial.

Now how much could these few instances have contributed to delay or obstruct the trial? It just doesn't measure up to the gravity of the charge and the fact that these incidents have to be culled out, which happen in every trial, if the Court please, is an indication of the lack of real evidence there is to support the most serious charges which are being made against the respondents here.

14k, we have the same type of situation. Many of the incidents do not substantiate the charge at all.

The problem arose because of the need of reframing the questions. See, if objection were made on the ground stated, let's say leading, counsel knows he has to reframe his question a certain way. If the objection is that there was no foundation made he knows what to do. If it is a question which is improper and the ground is stated he can reframe the question. The reason for stating grounds for objections is to allow counsel to reframe questions.

Here, being met with objections and no grounds stated, counsel in order to proceed had to probe, "perhaps this was the reason," and he tries another question, "perhaps that was the reason," and he tries another question, and objections are still being made without grounds. Neces-

Transcript of Hearing of December 31, 1950

sarily, there was a need of framing a question three or four or five different ways to try to get the answer.

On that very point I should like to call your Honor's attention to the case of *Caldwell v. United States*. There the Court reversed a contempt conviction of a lawyer based on his alleged fault in disregarding an exclusionary ruling by recasting his question. The Court stated: "Undoubtedly in both questions counsel was seeking the same end, but unless a ruling is amplified by an explanation of the reasons therefor attorneys, especially in the course of rapid cross-examination, often put a question in different form, as a matter of caution," and so on.

Here we had no chance to get a clarification when we asked for it. When we asked for it we didn't get it. We said, "May we have the grounds, please?" "No."

Now it is awfully hard for lawyers in a long drawn-out trial like this to feel the impact of this every day and not be affected.

In that respect I would like, if the Court please, to call the Court's attention to the words of Joseph Choate, who in 1903 was defending William Travers Jerome, who later became United States District Attorney, and Mr. Goff, who later became a Supreme Court Justice in New York. He was defending them against a contempt charge and I think some of his comment is appropriate here. It is in his collected works. He said:

"How did Mr. Goff stand? Where we may all stand any day and lose our temper. We may say hasty things. . . ."

"The Court: You have never violated the rules.

"Mr. Choate: If I had been before your Honor, probably I should have. Here he was at the end of an exhausting trial of a week or ten days. On one of those days your Honor had almost reduced him

Transcript of Hearing of December 31, 1950

to inanition by a threatened night session, more than any of us can bear. Your Honor has forgotten in your fifteen years of repose upon the bench the straights to which we are put.

"The Court: Do you call it repose?

"Mr. Choate: Absolute repose. Your Honor has forgotten the straights to which we are put here at the Bar—the exhaustion, nervous prostration is no word for it, as the end of a trial approaches. You have seen these very men, not only in this but in other trials, almost ready to sink into their graves as the end of the trial approaches, so severe was the draft."

Now, he was talking about a trial of a week or ten days. We are not talking about a hearing that went through seven months, where things are relatively easy, there is no jury; we are talking about a bitterly contested trial over a seven-month period, and to expect that lawyers in such situation under pressure would not occasionally show irritability or express temper when pressed or be so exhausted as not to be on their best behavior every minute, and I say particularly under the trying rulings that were made, and even, if the Court please, as our brief will show, many of the comments of the Court itself—to expect from them the kind of conduct which would be exemplary at every turn would be to call them gods and not lawyers. It just couldn't be no matter what the intention of counsel were, and certainly they had an overriding intention in this case, and what was it? It was an intention to defend their clients within the framework of the Constitution, an intention under all the difficult conditions of prejudice that the Circuit Court of Appeals said existed to try to get a fair verdict out of a jury on such abstruse matters that a jury

Transcript of Hearing of December 21, 1950

of experts couldn't have decided on the meaning of the philosophical principles of Marxism and Leninism, and working also with an abiding belief that the very law under which they were being tried was unconstitutional and destructive of American democracy.

Would lawyers who believe that and fought in that kind of case and developed those issues and raised them to the Supreme Court and, as Justice Frankfurter said, apparently ably, in our petition for certiorari which was granted in part in our application for bail, and in the briefs we filed, and being aware of these issues from the first day of the trial when the trial court was saying there is no substantial question of law and constitutionality, and the Government was urging that there is not, would you say that these lawyers would have jeopardized the right to have this law tested and the freedom of their clients in order to engage in these items charged here to obstruct and delay the trial?

How did these items delay the trial? They did not. I pointed out to your Honor that many things were not done which could have made the trial much more difficult. Mr. Dennis was one of the counsel in this trial, a layman. Did he ask a question of a single witness? He did not. Your Honor knows the difficulties that arise when a layman seeks to question a witness. It was not done in this case. He spoke on very rare occasions. He spoke as he, his own counsel, saw fit to speak.

But there are so many positive instances that cannot be lost sight of that show this was a hard and difficult struggle, and one in which lawyers did their best under difficult conditions.

I think if your Honor keeps those conditions in mind and places these incidents in their context, where they belong, and looks at the expansions of this record where

Transcript of Hearing of December 21, 1950

things went in normal course, there was not that persistent improper action as charged, which, according to Mr. Adams, gives rise to the existence of a conspiracy.

This is of course a most serious argument. I should say the most serious argument I have ever made. I am going to curtail it now because I think to give your Honor more at this time would be to unduly burden your Honor. It is the most important argument I have made in 27 years of law practice and in many courts of this land.

I read the record and asked myself, "Your Honor, what could I have done differently in this case. I find situations here and there, as I pointed out here, where I could have acted differently if one had the time and calmness and patience to think when you are on your feet and on the spur of the moment and to act at all times correctly. But at the same time, I read through the incidents, and I cannot see in them any change in the way I have conducted myself over many years, and your Honor knows to what large degree habit plays in courtroom tactics. It is hard to act out of character. It is hard to be different, because you are acting spontaneously, like a prizefighter in a ring. When the next situation develops, it requires your thinking and attention. It is hard to act out of character; and if something happened to me in this case which did not happen in any other case in years when I handled bitter labor disputes, which also had their environment and prejudice, then I must say there was something in the case itself and not in me. There was something in the issues before this Court in the way they cut across the deepest sentiments of the community, in what was being tried, in who was being tried, in the time in which it was being tried, which made the difference.

I think your Honor will find when your Honor studies the record that that is probably the situation, that that

Transcript of Hearing of December 21, 1950

is what happened, and when these alleged acts are evaluated that way, first in themselves, then in their context, then in the larger context of this trial, I think your Honor will have an assurance in deciding that we are still fit to practice law, that this kind of charge will not be made against us for perhaps another 25 years, if we live that long.

The Court: Do you wish to reply, Mr. Adams?

Mr. Adams: Your Honor, I wish in view of the lateness of the hour to make only a few general observations, if I may. It seemed to me, listening to these respondents talk all afternoon, that they were back again at the old game which persisted throughout this trial, of charging everything that happened either to the hostility and hysteria in the community or to the deliberate conduct of the trial judge. It was not definitely stated here this afternoon that it was the conduct of the trial judge. There were many, many references here indirectly to what was called the "context", to the position in which they found themselves, almost as though they had been trapped. There has been an attempt, it seems to me, to suggest to the Court that they only did what they had to do, that their conduct was forced upon them, and if in the heat of controversy they may have in one or two instances overstepped the bounds, they are sorry.

We do not look at the case in that way. It is to the petitioner a case of public importance in which the obligation of counsel transcended perhaps any other obligation that they had in any other case. We say that they completely disregarded that. We say that their duty, if possible, was even higher than that in the ordinary case. I think that that is true in any state trial.

Now, reference has been made to the Zenger case. I have no doubt that Judge Frank was referring to that when he talks about the briefs that were filed "which

Transcript of Hearing of December 21, 1950

eloquently recall how in the past courageous lawyers have importantly contributed to liberty and democracy by defending unpopular clients despite the browbeating of tyrannical, domineering trial judges, and in those briefs fear is expressed that if we affirm any of the contempt orders in this case lawyers for labor unions or minority groups or for unpopular persons will in the future be intimidated or throttled. The eloquence is misplaced. The fears are unfounded."

I think this eloquence on this subject this afternoon is equally misplaced. So much for that aspect.

Now, a second basic aspect of the argument this afternoon, it seems to me, has been this, and it is one which we have met time after time after time, where people are charged with a concerted action. They characteristically isolate one or two offenses and try to convince the triers of the facts that because they didn't do those things, they were not answerable for the main charge. That has been done again and again, particularly by the respondent Isserman.

I have to come back again, Judge, to say that you unfortunately, if I may put it that way, in the sense it is a long tedious job, will have to read the whole record. There is no way I can out of my mouth or in a brief supply to you that which will come to you as you read the entire record.

The Court: If I read all the references which both sides cite to me, don't you think that would be a sufficiently complete discharge of my duty.

Mr. Adams: It would be impossible for me to advise you as to the nature of the discharge of your duties, which I know will be fully discharged. I am only trying to make the point that you have to get a total impression of this case.

Transcript of Hearing of December 21, 1939

The Court: I want to ask you, Mr. Adams, if you feel that an impression arrived at by reading the pages to which specific reference is made will not be sufficiently comprehensive?

Mr. Adams: I should think it would probably be, but I am sure that your Honor will want to know enough of the general record to know how these things happened and the manner in which they developed. I am not certainly suggesting any guide to your Honor. You will get a very definite and, I should say, very strong impression, conviction, I should think, from the references in the petition. But I should not like to say that the whole of this case can be understood without having at least an understanding of the whole of the proceedings. I should not like to say, certainly, that your Honor has any burden of reading the entire record, page for page, word for word, but I think perhaps—I will put it this way—a familiarity with the entire record, I believe, is essential for an understanding of the conduct of the respondents in this case. Now, I would like to call attention to one more thing.

Mr. Isserman here referred to the fact that only one reference was made, as far as he was concerned, to conduct on his part, and he read and endeavored to explain his conduct in that instance. I said there were more instances than that, referring to him. There are. And I may call attention again to this incident where the Court found the conduct was dilatory and obstructive:

“Then they proceeded to call a member of the petit jury panel for the January 1949 term named Allen and asked him what was the ‘assessed valuation of the home’ in which he lived. The Judge ruled that the witness might be asked whether he owned property in excess of the amount required to

Transcript of Hearing of December 21, 1950

qualify for jury service, but could not be asked in detail of what his property consisted. After protracted arguments by Sacher, McCabe and Isserman, the original ruling was adhered to, which precluded details as to the juror's economic status. In spite of this Isserman and Sacher continued to interrogate the witness as to the details of his property holdings, his income, other information such as had been excluded by the Court in previous rulings and many quite irrelevant matters. These questions continued over many pages of the record. The prior rulings and objections were entirely sufficient to protect any rights which the indicted defendants had on appeal, and the repeated questions appear to have involved obstructive and dilatory tactics."

I mention that particularly, your Honor, because the respondent Sacher in referring to paragraph 14-a. said that the record references only had to do with the times when the Court warned these respondents or the times when the Court found that their conduct was dilatory and did not refer to the particular evidence showing that the conduct had been dilatory.

Now, you have to look at each of the findings of the Court on the subject of dilatory conduct, obstructive conduct, and so on in reference to what came before it. The finding is there as a guide for your Honor. The evidence upon which it is based is clearly in the record, as was this instance which I just quoted, for example.

Now, may I, your Honor, go along the line that your Honor has suggested, a concordance, which I think is a very good idea. There again I have to say to your Honor that that should be helpful and must be considered in reference to all of the record, backward and forward, that deals

Transcript of Hearing of December 21, 1959

with that particular point. However, I feel that the totality of the conduct will be quite plain to your Honor from what we are able to give you and from the entire record.

Now, I should like to refer for a moment to the somewhat extended argument which was made by the respondent Sauber as to the propriety of filing the challenge and with the conduct and with the challenge proceedings. His point is that the Circuit Court found that there was some basis for the challenge proceedings. It is there, Judge, that I think the respondents either misapprehend or are completely oblivious of their own conduct and the consequences of it. We don't challenge the right to trial jury challenge; we don't attack it; we don't criticize it; we don't attack anything that was done with respect to it. What was attacked is the way it was used and the misuse of the right. That is our whole point with respect to that; as it is our point with respect to the rest of the trial.

Now, there has been quite a lot said here this afternoon about the fact that the respondents, had they wanted to delay this case further, could have done a number of other things. I have no doubt they could have done a number of other things. That is not what we are considering here. What we are considering in this proceeding is what they did do, not what they didn't do, and it is no answer for them to say, "We might have conducted ourselves even more improperly." What we wait for, and I think in vain, here is for some explanation as to why they conducted themselves improperly in the respects in which they are charged in this complaint.

Then again they say, "There were many things that happened in the course of this case which we are sorry about now. We are sorry that we did these things and we would not have done them because we were under the kind of pressure and we had a situation where the Court was

Transcript of Hearing of December 12, 1930

putting us in a position where in order to protect our clients we had to do all these things."

But they do not come down ever to real gripe with the problem. How do they explain what they did? It does not answer it to say that they were tired, that they were hot, that the case was important—for this very compelling reason, it seems to me: that this record is full of many, many instances in which the Court pointed out this conduct from the very beginning. It is true that the trial lasted eight or nine months, but when the Court at the very beginning tries to control counsel and counsel thereafter pursues in a course of conduct, I do not think you can now charge it off to saying that this is the sort of thing which is inadvertent and which we are sorry about now and which we would not have done under other circumstances.

I think that your Honor will, when you come to it, feel that you should give, and I hope you will give, considerable emphasis to the attempts on the part of the Court to control the conduct of these respondents and their colleagues.

The defense here, if it may be called that, is actually in confession and avoidance. There is no attempt actually to justify this conduct in terms of the conduct itself. It is rather an effort to say, "We did all these things under the cloak of a legal right," but there is no effort here to say or deny that they misused the rights with which they were entrusted by the Court, and that is where I quarrel with them.

Your Honor, it is, as the respondents have said, a serious thing, a very serious thing, to be called upon to present charges which would lead to the disbarment of lawyers. It is a matter with which the Court deals only with the greatest care and deliberation, because the Court and counsel realize the consequences, but we must realize too the function of this proceeding which is to act possibly

Transcript of Hearing of December 31, 1950

as a deterrent to lawyers who may do or think that they can do the same thing in other cases.

I will not, as I say, longer trouble your Honor, because I believe that we will have an opportunity to argue specific situations in any briefs that we may submit.

I should like to leave you with the sense, which I convey with great respect to the Court, the sense of betrayal that the bar of New York has and to submit this case to your Honor with that sense as forcefully expressed as I can.

The Court: I should like to ask the respondents how they would answer the question that I put to Mr. Adams. Do they feel that in order to do complete justice in this case I really ought to read the whole record or do they feel that the issues are such that if I read what is particularly designated that will adequately cover the ground?

Mr. Sacher: It would seem, your Honor, that the compass of the items charged in the petition is not so large, that enough of the surrounding context could be provided to you without requiring you to read at least 20 volumes. I should imagine that a few pages before and after should be sufficient to give the flavor of the incidents and—

The Court: It would be unless there were incidents spaced at considerable distances in the record. For instance, take this so-called Social Register incident that Mr. Isserman refers to. If I read two or three pages around the citation in the petition I should read the earlier incidents to which he apparently thinks I should also take into account. So my question is broadly this: If counsel will have an opportunity to cite all connected instances, may I rely on their citations as being complete?

Mr. Isserman: I would think that we could do that and we would probably be a little more liberal in citations if we felt your Honor would not read the whole record, but I think your Honor would probably indulge us in that

Transcript of Hearing of December 22, 1939

fluently. We might want to show some parallel situations or some situations which created a condition for what happened, later not directly connected with the incident as in this Social Register case, but I think we should take upon ourselves the burden of doing that for your Honor.

The Court: Well, let us leave it this way: that unless I am asked to read the whole record in the final briefs, unless the final briefs indicate that it is the consensus that the citations are sufficient, I will then proceed accordingly.

How long—

Mr. Adams: If your Honor please—did I interrupt your Honor?

The Court: No, I was going to ask how long counsel wish for briefs?

Mr. Adams: Could I address myself to the same thing you were talking of just for a minute?

The Court: Yes.

Mr. Adams: I understood your Honor's problem with reference to the record. I should just like to leave it with the thought that however your Honor comes by it, whether through briefs or through some kind of consideration of the record, or however it may be done, I believe that it is necessary to have an understanding of this whole case before your Honor can really determine the responsibility of these respondents, and I should not like to think that any isolation of incidents would prevent a consideration by your Honor of everything in the case.

The Court: You are saying then, are you, that you feel I should read the whole record?

Mr. Adams: No, I am not saying quite that. I am saying that you would have to have some understanding of the entire case, and that certainly would not involve reading the whole record, but it does involve some familiarity with the

Transcript of Hearing of December 21, 1950

entire course of the proceedings. But true we may be able to supply that in the brief.

The Court: You are suggesting that perhaps I read two volumes at a time?

Mr. Adams: With one in each hand. Not quite that. But I do believe some familiarity with the whole proceeding is necessary.

The Court: Incidentally, what is the present status of the contempt case?

Mr. Sacher: We are still awaiting a decision on our petition for certiorari from the Supreme Court.

The Court: How long is desired for submission of briefs?

Mr. Sacher: Would your Honor take into account our great weariness over the past six or seven weeks what with the preparation for the Supreme Court and the preparation for this, so that we could perhaps have a week in between now and the first of the year when we would not have to work on a brief or something?

The Court: I think that is not unreasonable.

Mr. Sacher: We thought that we ought to really have Mr. Adams' brief first because, as we appear today, we did not know what the approach of the petitioners was going to be.

The Court: Well, then, let's follow the order of argument and let Mr. Adams file first and the respondents can file thereafter, and if desired Mr. Adams can reply.

Mr. Sacher: That is satisfactory, your Honor.

The Court: What do you suggest, Mr. Adams?

Mr. Adams: That suits me, Judge. We ought to try to get at a date. I have some court commitments myself.

The Court: So have I.

Mr. Adams: Glad to hear it.

Transcript of Hearing of December 21, 1960

Well, tomorrow and going right on in the immediate early part of the year—as soon as New Year's day is over as a matter of fact, we are going on. I would think that we ought to be able to have a brief in your hands by about the 15th of January, if I might, your Honor.

The Court: Well, I suggest you play safe by taking at least until January 20th. That is a Saturday.

Mr. Adams: All right, your Honor, and I can't tell if I get into a trial that involves me too much, it might be that I would have to ask you for a few more days, if I could leave it that way.

The Court: Very well. And then how long do the respondents wish for reply?

Mr. Sacher: May we have a month to reply?

The Court: You feel that is a reasonable request?

Mr. Sacher: I am inclined to think so, your Honor, because I think our problem will be not only to respond to the specifications that are pointed up, and we don't know what new ones will be added in view of his announcement that he relies on the entire record, but that we shall in addition have to deal with other sections of the record that may be necessary to employ that concordance—I am speaking in larger terms now than simply getting it up for your Honor.

I am not, your Honor, insisting that it must be a month, but it just would be helpful if we could have it.

The Court: Well, I now will set a limitation of February 10th. That is three weeks. But I do so with the thought that when you receive petitioner's brief you may find the task is not so formidable as you think, that indeed your preparation for today's argument has largely covered it.

And if we allow two weeks for reply, if indeed any is deemed necessary, will that be satisfactory, Mr. Adams?

Petitioners' Exhibit A
Memorandum of Decision of Hincks, U. S. D. J.

Mr. Adams: Quite satisfactory, your Honor.

The Court: Well, that brings us down to February 24th.

Then I guess this is as far as we can go today.

I will take charge now of the loose exhibits, and the several printed volumes I will leave to the clerk to handle. Thank you for your cooperation.

Memorandum of Decision of Hincks, U. S. D. J.

(Filed—January 4, 1952.)

This is a petition brought in behalf of the Association of the Bar of the City of New York and the New York County Lawyers' Association seeking the disbarment of the two above-named respondents for professional misconduct alleged to have occurred in connection with their professional representation of defendants in the case of *United States v. Dennis, et als* (hereinafter referred to as the *Dennis* case) in the trial thereof and the proceedings preliminary thereto had in this court, Honorable Harold R. Medina, Presiding. The trial of the *Dennis* case and the

Memorandum of Decision of Hincks, U. S. D. J.

preliminary challenge to the jury impanelled to hear the case began on January 17, 1949 and continued, with occasional intermissions, until October 14, 1949 when it resulted in a verdict of guilty as to all of the defendants. Sentence was imposed on the defendants on October 21, 1949. The judgment of conviction was affirmed by the Court of Appeals on August 1, 1950, 183 F. 2d 201, and on June 4, 1951 by the Supreme Court, 341 U. S. 494.

At the close of the trial in the *Dennis* case, Judge Medina entered a contempt certificate wherein he summarily convicted all of the defendants' lawyers in the case, including these two respondents, of criminal contempt of court committed in the trial proceedings and imposed sentence accordingly. This conviction was affirmed by the Court of Appeals, 182 F. 2d 416, as to all the Specifications thereof except Specification I, which charged that all the lawyers involved had conspired to obstruct and delay justice, and except Specifications XV and XVIII directed against the respondent Sachse which on that record were deemed to lack adequate proof. From this affirmance, the Supreme Court granted as to specified points an application of the respondents for *certiorari*, 342 U. S. 858. At this writing, the decision of the Supreme Court on the points allowed for argument on the writ is still pending.

This petition by paragraph 14 charges that the respondents joined with other counsel who though not members of this Bar represented other defendants in the *Dennis* case in a wilful, deliberate and concerted effort to delay and obstruct the trial and proceedings for purposes generally described, and by the means described in general language in sub-paragraphs (a) to (m) of said Paragraph 14. This paragraph refers to the entire record of the *Dennis* trial and proceedings which is incorporated into the petition

Memorandum of Decision of Hincks, U. S. D. J.

as Ex. A; and it enumerates copious citations from the *Dennis* record, 310 in number, which are claimed to support the charges made. By their answer to the petition, which was a lengthy document of highly argumentative nature, the respondents did not deny that their conduct was in fact as set forth in the *Dennis* record, but they did deny, as I construe their answer, that they had acted in pursuance of any conspiracy and asserted that their admitted conduct as reported in the *Dennis* record was proper in that it was by way of discharge of their professional duty to their respective clients.

The petition by Paragraph 15 charges that "the (*Dennis*) record further discloses" 36 specific acts of alleged misconduct against the respondent Mr. Sacher, each of which it purports to support by quoting or summarizing excerpts from the *Dennis* record. Paragraph 16 charges directly but in general language several categories of alleged misconduct on the part of Mr. Sacher alleging that "some instances of such conduct are to be found" in the *Dennis* record at pages specified. These instances are 70 in number.

By Par. 17 the petition charges that "the (*Dennis*) record further discloses six specific acts of alleged misconduct on the part of the respondent Mr. Isserman by quoting or summarizing excerpts from the *Dennis* record and by Par. 18 charges directly but in general language several categories of alleged misconduct by Mr. Isserman asserting that as to him "some instances of such conduct . . . are to be found" in the *Dennis* record on pages specified. These instances are 23 in number.

As to the charges contained in Para. 15 and 17, the respondents' answer, which contained no denial of the factual matter charged in the petition, in effect admitted that their conduct was as reported in the *Dennis* record

Memorandum of Decision of Hincks, U. S. D. J.

and as charged in the petition, but left room for their contention that the conduct specified was not unprofessional or deserving of the disciplinary action sought by the petition. As to the direct charges of misconduct contained in Paragraphs 16 and 18 the respondents' answer contains no denial but only the assertion that the acts of misconduct charged as misconduct, though not denied, "do not, in context, evidence unfitness on the part of either of the respondents for professional practice."

Feeling that the respondents may not fairly be called upon in a proceeding such as this to justify conduct not specifically referred to in a trial record of over 15,000 printed pages, I view the issues raised by Paragraphs 15, 16, 17 and 18 of the petition as confined only to the conduct of the respondents approximately identified by quotations from, or cited page references to, the Dennis record, although of course the quality of that conduct may be judged, and should be judged, against the background of the entire record.

Such being the issues raised by the petition and answer, the record of fact was made at the hearing on the merits, which was held on December 20, 1950. This was conveniently accomplished by the receipt in evidence of the 21 volumes of the record as printed for purposes of the appeal to the Court of Appeals from the judgment of conviction in the Dennis case. This voluminous record was offered in evidence by the petitioners and received in evidence here without objection by the respondents: neither petitioners nor respondents offered other evidence. Thereupon the parties were fully heard in oral argument and thereafter written briefs were submitted. The respondents' brief was in substance joint and several: it comprised an aggregate

Memorandum of Decision of Hincks, U. S. D. J.

of 722 typed pages incorporated hundreds of printed pages from the Dennis record. The petitioners' briefs aggregated 55 printed pages. The last brief was received on or about April 1, 1951. The vast amount of detailed material thus presented for perusal, study and analysis—not to mention the obligations attaching to full-time judicial service in a busy district—will sufficiently explain, I trust, the time, seemingly unconscionable, for the completion of this memorandum of decision.

PARAGRAPH 15

(DIRECTED AGAINST THE RESPONDENT SACHER)

By this paragraph are charged thirty-five instances of alleged improper conduct on the part of Mr. Sacher, each stated in a separate specification designated serially by Roman numerals. I will hereinafter refer to these specifications as "15-I", "15-II", etc.

Subject to the excepted specifications hereinafter noted, I find that the specifications in Par. 15 are fully proved. And I hold that the facts so proved constituted unprofessional conduct on the part of the respondent Sacher. This holding, as to most of the specifications, is too plainly required to justify discussion. Two of them, however, involve misconduct of such gravity as to warrant comment.

The respondent points to the fact that the conviction of criminal contempt based on the incident (R. 4829-34) which here is the basis of Specification XX was reversed on appeal. 182 F. 2d 416, 424. But in the contempt proceedings the respondent had had no opportunity to offer evidence in defense of the charge, or even to plead to the specification. Here, although the specification expressly and directly charged that Mr. Sacher knew of the Judge's misapprehension as to the limited scope of his offer, in his

Memorandum of Decision of Hacks, U. S. D. J.

answer he failed to deny his knowledge of the misapprehension; and although thereafter he had opportunity to testify and offer evidence in his defense, that opportunity was not availed of. On brief, he points merely to the appellate ruling in the contempt case and adds that the incident is "insufficient to support the serious charge based thereon." I completely disagree. I note also that the incident puts the respondent's attitude in an anomalous aspect: with the record replete with instances of extended argument not wanted by the Judge the respondent here is shown as silent when his professional duty required him to speak. His conduct as charged in this Specification was as gross a violation of his duty as a lawyer as an affirmative representation falsely made would have been. In my judgment a lawyer who recognizes no impropriety in the conduct charged in this specification, cannot safely be trusted to participate in future trials in this court.

His conduct as charged in Specification XXXVI was provocative in the extreme: it was a direct violation of Section 17 of the Canons of Professional Ethics of the American Bar Association, which have been widely adopted by many State Bar Associations. True, without conflict with the proprieties it was permissible to argue, for what the argument might be worth, that the secrecy of meetings to advance the political objectives of the Communist Party was no more indication of intent to destroy the government than the secrecy which attended meetings of early Christians. But the assertion that opposing counsel if a contemporary of Jesus "would have had Jesus in the dock" was so improper as to be atrocious. Most of us believe that Anglo-Saxon justice is a considerable improvement on Roman justice as administered in the time of Jesus. But if lawyers in the course of trial inject such unwarranted

Memorandum of Decision of Hacks, U. S. D. J.

accusations against opposing counsel modern justice will inevitably deteriorate into trial by inflammation.

Nor can I find anything in the situation to extenuate this instance of improper resort to personality. When at the time of the incident the Judge called attention to the absence of apology, Mr. Sacher said only "I have no apologies to make." In oral argument here he attributed the personal reference in his remark to an intent to make his argument "graphic" and explained his refusal to apologize by saying that he "felt that a historical allegation had been misunderstood and made to look like an attack on opposing counsel which was altogether unintended." He added "I daresay that upon reflection I would have unhesitatingly made whatever amendments" were deemed needed. On brief, he said the incident in the light of the context "evidences no impropriety which warranted disciplinary action." I am unable to accept this belated disclaimer of improper intent as sincere. Surely, as a lawyer of experience Mr. Sacher must have been alive to the inflammatory effect of personal references to opposing counsel. In any event, here he was immediately advised of the personal resentment caused by his remark. If he sincerely believed that a "historical allegation had been misunderstood" and wrongly construed as an intended personal attack, then and there was the time and opportunity to correct the misunderstanding and make timely disclaimer and apology. It would be naive to accept his belated disclaimer of wrongful intent when the tendency of his statement was so obvious and its effect so immediately manifested. Nor was the gravity of the offensive remark palliated by the fact that as far as the record shows it failed to start a conflagration. That result was averted only by the remarkable dignity and self-restraint of the gentleman unwarrantably subjected to the offense.

Memorandum of Decision of Hincks, U. S. D. J.

My conclusion that the remark was intentionally provocative is corroborated by other instances of provocative conduct cited to Par. 16 of the petition and by the insincerity of his frequent disclaimer of disrespectful intent in comments reflecting on the Judge shortly followed by repetitions of the offense. The incident on which this specification (15-XXXVI) is laid, thus appraised, is crowning proof of the fact that Mr. Sacher is a skilled master in the art of inflammation and so habituated to the practice of that art that he cannot safely be left as a member of this Bar.

So much for the specific instances of misconduct charged by Par. 15 which I find fully proved. The specifications of this Paragraph which I have excepted from my holding of misconduct, I will now enumerate. As to some of these, I think it desirable to indicate briefly the basis for my decisions.

The specifications excepted as not found proved are the following, viz.: 15-I; 15-VII (true, Mr. Sacher's comment, R. 1560-1, here was uncalled for and might be construed as a reflection on the impartiality of the Judge, but as I read the incident in its setting it is also, and almost equally, susceptible to innocent interpretation. Thus as to this incident I find the petitioner has not sustained the burden of proof); 15-IX (true, the comment, R. 2528, was objectionable in unnecessarily injecting personalities, but the record fails to show inflammatory or disrespectful intent); 15-XII (R. 3494-5); 15-XV (in excepting this specification (R. 4228-9) I do not overlook the fact that at a later stage in the trial the judge indicated a belief that Sacher's representation recorded in the excerpt embodied in this specification was deliberately false. For aught that appears the trial judge, perhaps by reason of his opportunity to observe the court-room scene, may have had a basis for

Memorandum of Decision of Hincks, U. S. D. J.

his belief not now available to me in the record of the spoken word. But since this specification charges only the representation, which I take as proved, and does not charge that the representation was falsely made, the respondent's failure to deny does not operate as an admission and on the evidence before me I cannot find that Sacher knew that his representation to the court was false); 15-XVII (R. 4724); 15-XVIII (the excerpt recorded in this specification, R. 4701, shows Sacher speaking of the "design" of the ruling just made which the Judge took to be a reflection on his impartiality. The language used would have been unexceptional if Sacher had said "scope" or "effect". For present purposes I think a charge the validity of which depends upon such a nice distinction in words, is not sufficiently sustained); 15-XXVI (in excepting this from the proved specifications, I do not fail to recognize the responsibility of a lawyer to restrain his client from improper behavior in the court room. But here Winston's outburst, so far as appears, was not instigated by Mr. Sacher and it was so speedily terminated by the court that Sacher had no opportunity to interpose. Thereafter, the situation revealed by the record seemed not to require that Sacher should interrupt the proceedings to admonish his client. True, the record suggests that for some time the client with his co-defendants remained standing. But the erect position of the defendants, so far as the record shows, seems not to have disturbed the Judge who proceeded to hear other counsel without further disturbance apparent in the record.)

That the proof of Specifications XX and XXXVI of Paragraph 15 demonstrates Mr. Sacher's unfitness to remain a member of the Bar of this Court is further demonstrated by the nature and frequency of his reflections on

Memorandum of Decision of Hincks, U.S. D. J.

the fairness of the trial Judge, often expressed in insolent and sarcastic manner, when no comment whatever was necessary or even in order. The sincerity of his frequent disavowals of disrespectful intent, when admonished, is negatived by his conduct in repeating, in somewhat variant form, objectionable comment of the same import. It is my conclusion that the proved specifications of Par. 15, standing alone, require an order of disbarment.

PARAGRAPH 16

(DIRECTED AGAINST THE RESPONDENT SACHER)

This paragraph of the petition directly charges professional misconduct on the part of the respondent Sacher which is summarized in five categories and in support of these charges points to seventy instances by page reference to the *Dennis* record. These five categories I will deal with, *seriatim*.

1. First, there is the charge that this respondent persistently, in disregard of repeated warnings and orders of the Court, argued without permission and refused to desist from argument and comment. This charge I find proved: it is abundantly sustained by the cited references to the record.

Beginning in the earlier stages of the proceedings the Presiding Judge, in obvious effort to make progress with the proceedings, on many occasions when he felt that argument would not be helpful to him in arriving at a decision on the particular point of controversy, expressly directed this respondent and other counsel to desist or abstain: too often such directions were disregarded by this respondent. At an early stage, while the challenge to the jury panel was in process, the Judge ruled (R. 2206) that thereafter

Memorandum of Decision of Hincks, U. S. D. J.

counsel, when objecting, should content themselves with a statement of grounds for their objection, and abstain from argument without invitation. Later, when he apparently felt that counsel in the guise of stating grounds for their objections were indulging in uninvited and undesired argument the Judge ruled (R. 3971) that thereafter counsel in objecting should state merely "I object" and abstain even from stating the grounds of objection unless invited.

It is apparently not claimed by way of defense to this charge that a defendant has a right himself or through counsel to be heard in argument on preliminary rulings in the course of trial. Certainly, the respondents point to no authority for such a proposition. Occasionally, when he feels it would be helpful in formulating his ruling in a doubtful point, a Judge will invite argument and when compatible with the need for progress in the trial a Judge will often indulge counsel in argument even though he feels no need for it. But it is clear that the control of the volume of argument is a matter which lies wholly within the discretion of the trial Judge.

There is a distinction, though I freely admit a somewhat shadowy one, between argument in support of a legal contention and a statement of grounds for a stated objection. And there are cases in which appellate courts have held that they will not on appeal consider an objection not supported by a statement of the grounds therefor. But in these cases it was implicit in the appellate opinion that the objecting party had had an opportunity to state his grounds, yet failed to do so. Cf. *Stewart v. U. S.*, 131 F. 2d 624, cert. den. 318 U. S. 779; *Duncan v. U. S.*, 68 F. 2d 136, cert. den. 292 U. S. 646. I know of no case which holds that a party will lose his rights to a review on appeal for failure to inform the trial judge of the grounds of his

Memorandum of Decision of Hincks, U. S. D. J.

objection when the trial judge, in the exercise of his discretionary power, has ruled that no such statement should be made. Cf. *Robinson v. U. S.*, 30 F. 2d 25. Indeed, such a ruling on appeal would be inconceivable. It follows that the respondent's persistent violation of the Judge's ban on argument and statement of grounds was in no respect necessary for the safeguard of the client's rights and I cannot believe that the persistence of this respondent was attributable to any *bona fide* belief that his conduct was necessary to protect his client's rights. It constituted, I hold, unprofessional conduct.

When we come to gauge the seriousness of such misconduct it becomes at once apparent that it has a two-fold impact on the judicial process. The public spectacle of a lawyer, who is supposed to function as an officer of the court, acting in open defiance of the court's order necessarily reflects upon, and tends to dilute, the dignity and authority of the Court. It tends to breed disrespect for all manifestations of judicial authority not only in the particular proceeding in which it occurs but also in other proceedings as well and thus tends to create a public reaction which is destructive of law and order. If judicial authority is not allowed to prevail in the court room it cannot be expected to command that respect on the part of the general public which is essential to the stability of government and especially of a government which is bottomed on the consent of the citizens.

Such conduct also is serious for its time-consuming effect on judicial proceedings. To be sure, brevity is not a prime objective of the judicial process: the basic objective is the attainment of justice. Nevertheless, it is highly desirable that the judicial process, like every other governmental function, should be as efficient as is reasonably practical in the accomplishment of its end. Time-consum-

Memorandum of Decision of Hincks, U. S. D. J.

ing activities on trial necessarily impair the underlying capacity of the judicial establishment to cope with the never-ending flow of judicial business. Such tactics, if allowed to flourish unduly, create impatience and disrespect with the judicial process and may even jeopardize the achievement of the ultimate goal by diverting attention from the basic issues and creating confusion obstructive to the development of the truth.

The judicial process contemplates that time-consuming activities on trial which are not inherent as of right in the parties should be assessed for the extent of their contribution, if any, to the ultimate goal of justice. And of course the delicate task of such an assessment is entrusted to the discretion of the trial judge. For an abuse of this discretion, as well as for errors of law, the remedy is by appeal,—not by direct action of a party acting either in person or through an attorney in disregard of the judicial ruling. Such action, if permitted, tends to breed further violations of rulings with the result that the institution of trial on the merits will degenerate into trial by filibuster.

Conscientious compliance by attorneys with judicial rulings made in the course of a trial, subject of course to the right of appeal so liberally provided by law, is peculiarly essential in any system of law such as ours which puts such a premium on personal justice that it steadfastly refuses to penalize a party for the misconduct of his own lawyer. Cf. *Lambert v. U. S.*, 101 F. 2d 960. Without such compliance, the trial Judge is faced with a dilemma. If he allows the trial to proceed notwithstanding violations of his directions he loses control of the conduct of the trial. Or if he bars the offending lawyer from further participation in the trial, the client is left for the time being without representation to which he is constitutionally entitled. Certainly here such action would have neces-

Memorandum of Decision of Hincks, U. S. D. J.

sitated a mistrial since obviously a lawyer suddenly called into the case without preparation could not possibly have furnished adequate representation of the client's interests. A situation requiring a mistrial is always to be avoided: it causes delay and wasted effort and occasionally, at least, for its effect in thus obstructing justice, is even courted by defendants who have exhausted other dilatory tactics.

Tested against this analysis, it is plain that the quality of such misconduct, if proved in sufficient volume, will constitute a serious obstruction to the administration of justice. And that the volume of Mr. Sacher's proved misconduct was enough to make it a serious obstruction is all too clear from the record.

I turn now to consider the disciplinary action appropriate for the misconduct just discussed. The respondents in a joint answer plead that their sentences for criminal contempt will constitute a sufficient penalty if any professional derelictions are found to have been proved. But the task which has devolved upon me is one which requires a different approach. My problem now is not to fix the measure of the punishment which the respondents may deserve but rather to decide what safeguards are reasonably required for the maintenance of the proper professional standards of the Bar of this Court. To such a problem considerations of the possible deterrent effect of disciplinary action taken against these respondents on other lawyers in future cases I consider irrelevant. Here, the controlling test is whether this court, if it allows the respondents to continue as members of its Bar, can safely rely upon their future compliance with the directions of the trial judge in the discharge of his responsibility for the conduct of trials and in other respects faithfully discharge their responsibility as officers of the Court.

Memorandum of Decision of Hincks, U. S. D. J.

I regret that in my considered opinion the proved misconduct which is the basis of the first charge of Par. 16 demonstrates that Mr. Sacher has not satisfied that test. The record of this case shows that time and again, by special orders and standing orders he, like the other lawyers in the case, was directed to desist from time-consuming argument and comment but promptly again offended. Judicial reprimands of progressive severity were insufficient for his restraint. And, finally, cautions reminding him of liability for a future accounting for his contumacy proved equally ineffective. Against this uncontroverted record of his own conduct an inference is required that if ever again he is to participate as a member of this Bar similar misconduct may be expected.

Perhaps, as a "visiting" judge called upon to share the responsibility of the Court, I might have concluded that less drastic action against Mr. Sacher, such as suspension for a term, would not expose the proper functioning of the court to undue hazard if I had been satisfied that notwithstanding his actual misconduct he had had a sincere and timely change of attitude which might reasonably be expected to continue. But of such a change there is utterly no evidence. Never in the trial did he apologize for his misconduct or even admit its existence. Surely glib professions of forgetfulness of a direction repeated on innumerable occasions cannot give me firm assurance that his capacity to keep in mind judicial direction will improve in the future. Even in his answer he makes no admission of the misconduct so abundantly proven. He says only that his "*alleged*" acts of misconduct "when viewed as they must be, in the extraordinary context in which they occurred," * * * "*assuming* that they manifested unprofessional impropriety * * * do not evidence unfitness * * * for professional practice." Surely if even when pleading

Memorandum of Decision of Hincks, U. S. D. J.

to the pending petition he did recognize the impropriety of his past conduct I cannot safely assume that his perception will be more acute after a period of suspension.

Nor can I agree that his conduct is excused by "the extraordinary context in which it occurred." Granted that, as in his answer the respondent says, the proceedings were nine months long and involved "questions of transcendent political, constitutional and legal importance" one would expect that a conscientious lawyer sensitive to such implications would also have perceived the impact of conduct such as his on the judicial process. Of what avail is the vindication of one constitutional principle if attained only by the sacrifice of such a fundamental constitutional institution as a fair jury trial conducted not as the tactics and passions of counsel should suggest but under the supervision of the trial judge? The increasing length of trials, especially those involving criminal conspiracies, taxes to the utmost the proper technique of Anglo-Saxon justice and the capacity of the judicial establishment, as every lawyer must know. For the solution of this problem, the proper historic cooperation between Bench and Bar is indispensable. The length of a trial adds increased need for such cooperation—not proper occasion for its sabotage.

In their answer the respondents further say that the trial was "in an environment of extreme hostility directed not only against defendants but at defense counsel as well." As to this it may be observed that at an early stage the Trial Judge ruled that there was no such hostility of environment as to require a different trial venue and his ruling has been sustained on appeal. No evidence of the asserted hostility other than what may be gleaned from the official record of the trial was offered in the hearing on the pending petition. As I read the trial record such "hos-

Memorandum of Decision of Hincks, U. S. D. J.

tility" as appeared must be attributed to the improper court-room behavior of defendants and counsel. Barely misconduct is not excused because of its natural tendency to create an "environment" of extreme hostility. Quite the contrary.

By brief the respondents point to suggestions which they made at an early stage in the original proceedings that testimony along certain lines which they proposed to offer might be eliminated with time-saving effect if after negotiation with government counsel it were reduced to stipulated form. Their contention is that such suggestions tended to negative any intent to prolong the criminal proceedings needlessly. For present purposes let it be assumed that these suggestions were made in a sincere desire to save time. Even so, a willingness to save time through a technique of their own suggestion does not extenuate an unwillingness to comply with directions which the Judge thought appropriate for the attainment of that objective.

The respondents call attention to one or two instances in which the judge after curtailing their argument in criticism of an indicated ruling, later modified his ruling. Apparently these instances are referred to as tending to show that their persistence in argument in violation of the Judge's order was justified by the result. As to this, I am unable to perceive how any advantage, whether actual or supposed, obtained by violation of a judicial direction can justify the violation. As already pointed out, if the respondents believed that the indicated ruling was erroneous or that the restriction on argument was an abuse of judicial discretion, the remedy of appeal was available without need for contumacious persistence which tended to nullify the Judge's control of the trial.

Finally the respondents plead by way of extenuation, without admitting fault, that the trial pressures were such

Memorandum of Decision of Hincks, U. S. D. J.

as to put them under "all but unbearable strain." And their brief is replete with assertions that the specific instances of the conduct which I find unprofessional were excusable as of small moment and due to this "unbearable strain." As to this, a reading of the record suggests that if counsel had substituted respectful compliance for persistent recalcitrance, the "strain" would have been considerably mitigated for all concerned. It is also observed that counsel ought not undertake to participate in a case likely to involve such strain unless capable of enduring strain and restraining their own conduct within the limits of professional propriety. But I do not rest my evaluation of their plea of extenuating circumstances on these observations. At the respondents' request I have read, in addition to their exhaustive brief, every page of the record cited to the charge discussed above and every page which they suggest as material context and am impelled to a conclusion that as to Mr. Fisher his recalcitrance was congenital requiring an order of disbarment.

2. This paragraph also charges that Mr. Fisher "improperly" interrupted the Court and counsel.

This charge also I find abundantly proved. However, the misconduct here proved is far less serious than the customary found in the preceding section of this memorandum in that it was not in direct violation of judicial orders made and sustained; and it apparently had less time-consuming and obstructive effect on the progress of the trial. In many instances mere interruptions are attributable to impatience and impulsive and in advocacy which are common human failings seen in almost every trial. While not to be commended they are seldom serious enough to deserve disciplinary action. Here they were so frequent as to deserve reprimand, but if nothing further were involved, I

Memorandum of Decision of Hincks, U. S. D. J.

should not consider that more drastic disciplinary action was required.

2. By Paragraph 16 it is also charged that Mr.bacher "made insolent, sarcastic, impertinent and disrespectful remarks to the Court and conducted" himself "in a provocative manner." This charge also I find abundantly proved by the cited references to the record.

That such conduct was unprofessional needs no exegesis; I so hold. Even more closely than that dealt with in the preceding Section it touches the vitals of the judicial process: even greater is its tendency to obstruct the attainment of personal justice. And the proven volume of this misconduct also was such as to constitute a serious obstruction to the proper conduct of the trial. Overpersistance in argument, as observed above, tends to breed confusion. Provocative conduct tends to breed turbulence. Insolent and disrespectful remarks to the Court tend to undermine the judicial authority indispensable to the power effectively to cope with such intrusions which by their very nature obstruct the development of the real merits of the case.

For proved misconduct falling within this branch of the charge, I conclude that an order of disbarment is required.

4. Paragraph 16 also charges that Mr. bacher in the course of the criminal proceedings "shouted, snarled and cursed, all without regard or respect for the dignity of the court, etc." As to this also, the only evidence before me is the official record of the criminal proceedings. And, of course, the reporters from whose notes the record is transcribed, cannot directly record such conduct as is charged here—necessarily the record is almost wholly confined to the spoken word. However, the record does show that on several occasions the trial Judge admonished this

Memorandum of Decision of Hicks, U. S. D. J.

respondent for such conduct and that in each such instance the respondent either denied the conduct or professed inability to control his facial expressions. Thus as the matter stands the only evidence of record on this issue is hearsay on both sides, and the hearsay evidence is in direct conflict. However, this evidence came in without objection: the respondents made no reservations when the trial record was offered and received. And although the law on the point seems not to be wholly free from conflict the better rule is that even hearsay evidence is not wholly without probative effect; that when received without objection it is for the trier to appraise it and accord it such weight as he deems it to deserve. *Poliner v. Fancio*, 106 Conn. 350; *Dias v. United States*, 223 U. S. 442; *Schlemmer v. Buffalo, etc., R'way Co.*, 305 U. S. 1. And this ruling, I think, does not run contrary to the New York rule enunciated in *Dayton v. Parks*, 142 N. Y. 391, 37 N. E. 642, and *Strange v. Supreme Lodge, K. P.*, 159 N. Y. 345, 62 N. E. 432.

Assessing the conflicting testimony in the record in the light of the considerations which generally and properly control a trier confronted with such a task, I find this charge also proved. It may be noted, however, that there is additional support for the finding—not that I think additional support is necessary—by way of inference from Mr. Barker's failure to offer any direct evidence on the issue. It is true, that the burden of proof here is not on the respondent. But faced as he was with the recorded words of the trial judge which embody his observation of the respondent's conduct, Mr. Barker elected to rely upon his own recorded denial in the trial record. For aught that appears there were plenty of witnesses in the courtroom at the time in question whom the respondents might have called to testify before me, subject to cross examination, on the issue. He also had the opportunity himself to take the

Memorandum of Decision of Hincks, U. S. D. J.

stand. From his failure to produce any independent evidence on the issue, there is some substance to my inference that his bare denials appearing in the record of the criminal proceedings lacked factual support. On the other hand, there is no room for a reciprocal inference against the petitioner. This is due to the fact that the respondent in his answer did not deny the charge: as a result, there was no notice to the petitioners that the observations of the trial Judge as they appear in the trial record would not be accorded probative effect. Indeed, from the absence of a denial in the respondent's answer under Rule 8(d) of the Federal Rules of Civil Procedure he is deemed to admit this allegation of fact in Paragraph 16 of the petition. My finding is supportable on that ground alone. However, I have preferred to base it on the merits.

As a basis for assessing disciplinary action appropriate to the misconduct just discussed, the trial record, confined as it is to the spoken word, is by no means completely satisfactory. It shows that the specific instances on which the finding is based are much less numerous than those of the other proved charges of this paragraph. And here the record does not wholly exclude the possibility that some at least of these instances were attributable to unconscious reactions less subject to control than the spoken word. On the other hand, the record does not preclude the possibility that this was misconduct designed as by-play for some improper purpose. From the Judge's reported words it is inferred that this misconduct too had an undesirable effect on the course of the trial. Here, too, the absence of any testimony by the respondent to explain his conduct furnishes some ground for an inference not favorable to him.

On the whole, I feel that the proved misconduct here under consideration, independently considered, does not

Memorandum of Decision of Hincks, U. S. D. J.

warrant disbarment. But having in mind that conduct of this kind persisted even after repeated reprimands by the Judge, I feel that, if disbarment were not required by other findings, it would warrant suspension from practice for a period of three months.

5. Finally, Paragraph 16 also charges that Mr. Sacher asked improper questions with respect to matters already excluded.

In assessing the validity of this charge one should not overlook the frequent practice generally prevailing whereby examining counsel when confronted with an exclusionary ruling explores the scope of the ruling by a series of closely related questions. Often there is genuine need for such exploration. That is especially so when, as in the *Dennis* trial which gave rise to this disciplinary proceeding, the trial Judge declined to receive and rule upon offers of proof. Often, I am afraid, the practice is abused by effort on the part of counsel to put suggestions in the mind of the trier, especially when the trier is a jury, which are not supported by evidence duly received. However, under existing trial technique it is peculiarly difficult to draw a line between proper exploration, which itself is time-consuming, and an improper tactic designed to confuse.

This inherent difficulty takes on almost insuperable dimensions here where I am called on to determine the propriety of individual questions appearing in a record of tremendous volume made before another judge dealing with a multitude of issues each of many facets. In view of my other findings which appear to be controlling on the ultimate result, I think I cannot be justly accused of shirking a laborious task, if I omit all findings on this charge.

*Memorandum of Decision of Hincks, U. S. D. J.***PARAGRAPH 17****(DIRECTED AGAINST THE RESPONDENT ISSERMAN)**

By Paragraph 17, it is charged that the record shows that the respondent Mr. Isserman acted with professional impropriety in six instances each stated in a separate specification (hereinafter referred to by the designations 17-I, 17-II, etc.)

Specification 17-II charges improper conduct (R. 9532-6) tending to obstruct, and indeed effective in obstructing, the Judge's attempt to question a defense witness then under direct examination by Mr. Isserman,—conduct which was in derogation of the basic right of a federal judge to question witnesses. In weighing the gravity of this conduct I take into account the fact (it is a fact unless some fragment of this tremendous record has escaped my attention) that the Judge had made no order, general or special, that the parties might have the benefit of objection to questions propounded by him without express notation of the objection. In the absence of such an order, I think counsel were entitled respectfully to ask the notation of an objection. And I note that Mr. Isserman was somewhat encouraged in such a course by the fact that one of his objections led the Judge to revise one of his questions (R. 9531). Nor do I overlook the fact that at an earlier stage in the trial the request of counsel that an objection stated should be deemed to have a continuing effect, had been refused. Notwithstanding all this, a reading of the episode, even against the detailed analysis thereof contained in the respondent's brief and the copious context referred to therein, convinces me that Mr. Isserman's reiteration of objections to the Judge's questioning went far beyond what was necessary or intended to protect his

Memorandum of Decision of Hincks, U. S. D. J.

client's rights. It was, I find, intentionally contemptuous and obstructive. This conclusion is warranted even on the assumption that the Judge's questions ran counter to the law of evidence: even so, the defendants' remedy was by appeal and not by direct obstructive action by counsel. Here, however, the questions were such as to afford no room for the inference that Mr. Isserman acted in the sincere belief that there were genuine legal grounds for objection.

This misconduct, just discussed, especially since it continued in the face of repeated admonitions from the Judge, warrants disciplinary action. However, making due allowance for trial tensions I do not feel that this incident, independently considered, requires action so drastic as permanent disbarment. It does, however, demonstrate the need for the disciplinary effect of suspension from the Bar for a period. I hold that suspension for one year would be an appropriate disposition of this specification.

By Specification IV-a (R. 1134-8) it appears that Mr. Isserman observed that the Judge had "misconstrued" his earlier statement,—a remark which the Judge took as tantamount to accusation of deliberate intentional misconstruction. Mr. Isserman is in no position to complain of the Judge's interpretation of his conduct: he admitted (R. 1135) that he had said that the Judge had indulged in a misconstruction which "seemed to me" to be deliberate. Obviously that was an insolent remark for a lawyer to make. It was not only uncalled for but improper. Standing alone it would warrant suspension from the Bar.

Specification 17-III refers to an incident (R. 9541-2) immediately following that on which Specification 17-II was based. Mr. Isserman's part in this incident was a minor one and insufficient, I think, to warrant classification as misconduct.

Memorandum of Decision of Hincks, U. S. D. J.

While 17-I states a technical violation (R. 9376) of the Judge's order to abstain from statement of grounds for objection, the statement of grounds here made was so brief, and so unobjectionable in other aspects that, if an isolated incident, I should hold that it deserved no disciplinary action beyond the reproof made by the trial Judge at the time.

Specification 17-IVb (R. 2528) is sustained in that it shows that Mr. Isserman unnecessarily injected into the proceedings the personality of one not on trial. But there is plausible suggestion in the record that this was done in lighter vein and that the bare record affords no sound basis, I think, for inference that this was done with improper intent. I hold that in itself it shows no need for disciplinary action.

Specification 17-IVc (R. 6847) is laid on the same incident which was the basis of Specification 15-XXVI directed against Mr. Sacher. It, too, I hold not sustained.

PARAGRAPH 18 OF THE PETITION

(DIRECTED AGAINST THE RESPONDENT ISSERMAN)

This paragraph is the counterpart of Paragraph 16 in that it charges professional misconduct falling within the same categories as those charged against Mr. Sacher by Paragraph 16. In support of its charge against Mr. Isserman Paragraph 18 points to twenty-three instances of alleged misconduct by reference to the *Dennis* record.

After consideration of the oral argument and briefs of the parties here, and after my reading of the *Dennis* record, with painstaking scrutiny of those portions specified by either party as bearing on these cited instances of alleged misconduct, I make the following findings and rulings.

Memorandum of Decision of Hincks, U. S. D. J.

The citations to the record amply prove so much of Paragraph 18 as charges that Mr. Isserman acted improperly in that he delayed the trial by indulging in argument after the Judge's order against argument without permission, by unnecessary comments and other time-consuming tactics. Also that on several occasions he made insolent remarks and conducted himself in a provocative manner. These charges are sustained without need to invoke an admission by the respondent arising from his failure to deny the facts in the allegations of the petition.

However, the instances of proved misconduct on the part of Mr. Isserman, as charged in Paragraph 18, are not of such frequency and gravity as to require a conclusion that he should never again be allowed to practice in this Court. On the whole, I feel that his proven misconduct as specified by this paragraph warrants a year's suspension from practice.

PARAGRAPH 14 CHARGING IMPROPER CONCERT OF ACTION

This paragraph charges that the two respondents here joined with counsel not members of this Bar, who represented other defendants, in a deliberate and concerted effort to obtain specified improper objectives by improper trial conduct. In effect, it charges a conspiracy whereby it is sought to hold these defendants responsible for the improper conduct of other lawyers, who were allegedly members of the conspiracy. Thus the problem is posed as to whether the proofs support this charge of conspiracy.

The problem here is one of particular difficulty. In the situation presented, the trial of numerous defendants represented by five different lawyers, a wide range of concerted action between the lawyers was entirely normal and

Memorandum of Decision of Hincks, U. S. D. J.

proper: it was required for a proper presentation of the issues. Indeed, the situation was one in which proper cooperation between defense counsel might be expected to expedite the trial and to produce a just result. Thus from the bare fact of concerted action, no incriminating inference may be drawn. This was recognized by the petitioners on brief when they say:

"The facts that although, on the record, the counsel in the *Dennis* case represented individual defendants, they acted jointly; that all counsel maintained a common office; that there was no conflict among the defendants; that the lawyers acted for each other during absences; that the examination of witnesses and the presentation and argument of motions were, for the most part, a common endeavor; that even in summation the counsel acted on behalf of all defendants rather than upon behalf of their individual clients, do not necessarily mean that they were engaged jointly in a wrongful plan."

In this observation I fully concur. Generally, cooperation between co-counsel is something to encourage—not to penalize. And in the long run it would be most unfortunate if in this or any case findings and holdings should emerge which should give counsel fear that mere concert of action with other participating lawyers might be treated as indicative of unprofessional conduct.

The petitioners argue however, that because each of defense counsel, acting apparently independently, committed repeated and similar breaches of professional conduct, it is inferable that the action of all stemmed from a common agreement having a common objective with the result that each was legally responsible for the misconduct of the others. The argument is plausible, but careful study

Memorandum of Decision of Hincks, U. S. D. J.

of the record fails to satisfy me that inference is sufficiently proved.

The fallacy of petitioners' position on this point is exposed in their assertion (main brief, pg. 17) that "this unity of interest and action, justified in itself, *provided . . . the means* by which the respondents were able to undertake their wrongful design." I cannot agree. Assuming, arguendo, the presence of wrongful design, the means for its accomplishment were not provided—at least so far as the proofs show—by unity of action or by a possible conspiracy. The means provided were the powers which under Anglo-Saxon jurisprudence are entrusted to trial lawyers. True, these powers are such that they are susceptible of perversion to the accomplishment of an improper design. But they are no more adapted to accomplish a common design than to accomplish a design individually entertained. In net result it is no more reasonable to attribute the conduct of each to a conspiracy having a common design than it is to attribute it to the individual intent of the actor whose improper design, unhappily, may happen to be the same as that of others. Since we are not here concerned with a problem in criminal law let me suggest an analogy from the field of ethics which has had some recent publicity in connection with the activities of so-called "peddlers of influence." Assume that a single manufacturer, thirsty for government contracts and credit, employs several "brokers" each to solicit a different government agency with which he is supposed to have influence. Each such "broker" may have the objective of obtaining without honest service a slice of public funds and each may use substantially the same technique. Obviously such a situation would betoken that unethical practices are contagious, but it is not so clear that such parallelism of action would justify a finding of conspiracy.

Memorandum of Decision of Hincks, U. S. D. J.

I do not overlook the charge, Par. 14(e), that counsel "persisted in making . . . repetitious . . . arguments . . . *working in shifts.*" This charge suggests an effort to predicate the proof of conspiracy upon something more than parallel conduct: it suggests reliance upon the fact that conduct of one was dependent on another. But such dependence of conduct as appears in the record is as plausibly attributable to the facility of one to utilize a situation created by another for the achievement of his own improper design as to prearrangement for the achievement of a joint design. In this trial, as generally, proceedings were highly fluid and just as an incident developed by one might require proper action by another, so it afforded a fresh opportunity for improper conduct by another. The record amply demonstrates that all defense counsel were adroit and quick on the trigger. Careful analysis of all the reported incidents cited to this charge, as indeed of all the petitioners' citations, fails to satisfy me that any apparent dependence of the improper action of one upon the actions of another should be attributed to pre-arrangement or conspiracy rather than the independent intent of the actor.

Since the burden of proof is on the petitioners, confined as I am to the printed record I cannot find that the charge of conspiracy has been proved. It is not for me to speculate on what my finding would have been if, like the trial judge, I had had an opportunity to hear the spoken word and to see the court-room scene from which the words emanated. For instance, if the trial judge had observed a practice whereby a "visiting" lawyer, after whispered consultation with a local lawyer, arose to indulge in some improper act he would perhaps have a ground for inference not manifested in the official transcript for holding the local lawyer responsible for the conduct of the visitor. Just as the

Memorandum of Decision of Hincks, U. S. D. J.

credibility of witnesses may better be evaluated by a trier on the scene, so—in my view at least—concert of action between counsel can more accurately be assessed by an experienced trier. If it be deemed that a trial judge necessarily lacks the objectivity to interpret justly conduct actually observed in his court room and hence is not to be entrusted with power to preside over contempt and disbarment proceedings growing out of such conduct, it well may be that occasionally a lawyer actually responsible for the misconduct of another will escape the consequences. However, the responsibility of an officer of the court is fundamentally a personal one. Counsel for one defendant presumably has no control in the selection of a counsel for a co-defendant. Indeed, it has been held that in a federal criminal case the court itself lacks power to restrict a defendant's choice of counsel to members of its Bar. *U. S. v. Bergamo* (C. C. A. 3, 1946), 154 F. 2d 31. See also *Cooper v. Hutchinson* (C. C. A. 3, 1950), 184 F. 2d 119. And although sensitive to the implications of the foregoing observations, I am satisfied that the proofs now before me do not warrant a finding of conspiracy.

The conclusion expressed above will of course relieve each of these respondents of accountability for any misconduct on the part of others than himself. It will not operate, however, to exonerate them for proven misconduct of their own within the scope of Paragraph 14. It is true that a criminal case of conspiracy falls if the conspiracy is not proved. But this is a civil proceeding and Par. 14 charges, in effect, an agreement to engage in unprofessional conduct. The charge is thus analogous to a charge of civil conspiracy to accomplish tortious acts. The gist of such a charge, I hold, is the wrongful conduct and the allegation of conspiracy, if not made out, may be treated as surplusage. *Howland v. Corn*, 232 F. 35, 40;

Memorandum of Decision of Hincks, U. S. D. J.

Lewis Invisible Stitch Machine Co. v. Columbia Bindstitch Mach. Mfg. Corp., 80 F. 2d 862; *Barry v. Legler*, 39 F. 2d 297, 302; *United States v. Pan-American Petroleum Co.*, 55 F. 2d 753, 778.

I turn, therefore, to consider whether the instances of alleged misconduct cited to Par. 14 constitute individual misconduct on the part of each of these respondents, thus eliminating from consideration the greater part of the 310 references to the *Dennis* record cited to the paragraph which on examination I find of direct pertinence only to the conduct of the "visiting" lawyers who are not subject to discipline of this court.⁽¹⁾

⁽¹⁾ These three "visiting" lawyers, if I may so conclude from the docket entries which are not wholly explicit on the point (R. 13, 14 and 15), were members of the Bar of California, Michigan and Pennsylvania, respectively. Whether they had membership in the Bars of other courts seems not to appear. I have been at pains to make no comment on their conduct as disclosed in the record for the obvious reason that they, presumably because not members of this Bar, are not respondents in these disciplinary proceedings. However, I will say that my reading of the record here convinces me that the occasion is a timely one for comment on the subject-matter of the judicial responsibility for the discipline of visiting lawyers.

I will begin with the confession that heretofore, I fear, I have been remiss in the full discharge of my responsibility in this field. On the occasions, happily few in number, when I have observed unprofessional conduct on the part of a visiting lawyer in my court, conscious that only his "home" court has disciplinary power I have shrugged the matter off, perhaps with an ineffective reprimand, comforted by the thought that our paths would probably never cross again. In so doing, I overlooked the fact that I should feel very badly indeed if unbeknownst to me a member of my bar had brought reproach upon the entire bar by his conduct elsewhere. On reflection, I think I should have reported the affair to his home court and thus give it at least the opportunity to protect its bar from the disparage which it may suffer if the offending member be allowed to invoke its seal as a qualification for practice elsewhere.

Stirred by such reflections and influenced, I confess, by my reading of the record in these proceedings, the Judges of the U. S. District Court for the District of Connecticut have recently adopted a Rule of Court which I venture to set forth.

"Rule 1(e) VISITING LAWYERS."

1. Lawyers not members of the Bar of this Court who are members in good standing of the Bar of another Court of Record may be permitted to represent clients in trials of criminal and civil cases in this court on written motion by a member of this Bar. The motion shall

Memorandum of Decision of Hincks, U. S. D. J.

As to Mr. Sacher, I find as charged in Par. 14,

(1) that with intent to delay and obstruct the trial, he disregarded numerous warnings of the court concerning

state the visiting lawyer's office address, shall identify each court of which the visiting lawyer as a member of the Bar is an officer, and shall state that neither said lawyer nor any member of a firm to which he belongs appears on the list of lawyers disqualified to appear in this court referred to in subparagraph 3(a) of Section (c) of this rule. Said motion may be presented by the sponsoring lawyer at the opening of the trial, or, if desired, in advance thereof, and upon the granting of the motion the sponsoring lawyer, if desired, may be excused from further attendance.

2. If the Judge of another Court, who presided at a trial in which a member of this Bar participated, shall address to the Judges of this Court a communication stating that in the course of, or in connection with, said trial said lawyer indulged in unprofessional conduct the Judges of this Court will refer the matter to the U. S. Attorney or to a Committee of the Bar with a view to the institution and prosecution of appropriate disciplinary action.

3. If a visiting lawyer, admitted to participate in a trial in this Court in conformity with Par. 1 of Section (c) of this rule, shall indulge in conduct believed to be unprofessional the presiding Judge in cases deemed appropriate will

(a) Refer the matter to the U. S. Attorney or to a Committee of the Bar designated as the Judges shall determine, who will cause said lawyer to be served by registered mail with an order nisi requiring him to appear before this Court at a specified time and place to show cause why an order of this court should not issue precluding said lawyer from ever again appearing before this Court. If, after hearing or without hearing in the event of default of appearance, said order nisi shall be made permanent, the matter together with the orders therein shall be entered in the docket of the court and said lawyer's name shall be entered on a permanent list to be maintained by the Clerk of lawyers disqualified for appearance in this court.

(b) Address to the Presiding Judge of every Court having disciplinary powers over a Bar of which said visiting lawyer is a member, a communication specifying conduct believed to have been unprofessional supported when feasible by pertinent extracts from the reporter's transcript, for such disciplinary action, if any, as said Court or Courts shall deem appropriate."

In the belief that the problem to which this rule is addressed deserves thoughtful study for its impact on the good name of the legal profession and—having in mind the havoc that can be wrought by apostles of conflagration and confusion who occasionally travel abroad in the guise of officers of justice—for its impact on the public welfare, with such diffidence, as becomes a "visiting" judge I hereby venture to direct counsel for the prisoners, who has so kindly lent his services to the court for these proceedings, respectfully to provide each Judge on the Bench of the Southern District of New York with a copy of this footnote for such consideration as may be deemed appropriate.

Memorandum of Decision of Hincks, U. S. D. J.

wilful, delaying tactics and persisted in making long and repetitious arguments and protests, R 1572, 2475-76, 3700-2, 4059, 4965-8, 5456, 6131, 6565, 6936, 7066, 9220-1, 9751-52, 10,464, 10,525, 10,856, 11,212-13, and made needless reiterations of objections of others, 1065-92, 1573-4, 1658-71, 2277, 3728-30, 4402.

(2) that for the purpose of bringing the court into general discredit and disrepute, (a) he insinuated that various findings made by the court were made for purposes of newspaper headlines, R 621, 1069; (b) he accused the court of prejudice and partiality, R 384, 1498-9, 1660, 3045-8, 4806-7, 6411, 9185, 9403-5, 11213, 12051; and (c) made disrespectful, insolent and sarcastic comments and remarks to the court, many of which were with intent to provoke the court into intemperate action which might be availed of as ground for mistrial or later as error on appeal, R 384, 623, 1054-6, 1088-9, 1365-6, 1452, 1499, 1661, 1937-8, 2086-7, 3013, 3045-6, 4059, 4788, 9403-5, 11213.

Mr. Sacher's proved misconduct, as charged in this paragraph also, in my judgment requires disbarment.

As to Mr. Isserman, I find that as charged in Par. 14, he, too, improperly disregarded warnings of the court concerning time-consuming tactics by persistence in making long arguments and by the needless reiteration of objections by others. Examples of such conduct may be seen in the record at pages 1085-87, 1498-9, 1572-4, 1671, 2276, 3361-2, 3487, 3728-29, 3767-70, 3968-70, 4197, 4402, 4654, 6252-58, 9376, 9532-41. Certainly this conduct involved reckless disregard of the need to avoid a waste of trial time: the frequency of such conduct, on the whole, fairly warrants a conclusion that it was in wilful disregard of the court's warning against unnecessary delays. Such is my finding. And

Memorandum of Decision of Hincks, U. S. D. J.

the incident reported on pages 1124-5 of the record was insolent and provocative, I think intentionally so. Pages 2032-5 cited to this paragraph covered the incident which was the basis of Specification II in Paragraph 17 which I dealt with in my discussion of that paragraph.

In assessing in the light of the entire record the gravity of Mr. Insorman's misconduct as found in my findings in Paragraphs 14, 17, and 18, I feel that it is such as to require firm disciplinary action. However, his attitude as disclosed on the record and on his brief herein leaves room for reasonable expectation that the experience of discipline may have such restraining effect on his court-room behavior that in the future he may be safely expected to exercise without abuse the privileges of membership in this Bar. I also take into account that there is some duplication of the proved charges of these three paragraphs.

CONCLUSION

It is therefore my conclusion that Mr. Sacher's membership in the Bar of this Court should be wholly terminated.*

(*) In relation to Mr. Sacher, I think I should make it plain that I feel in the entire record no intention that his conduct was tainted by vanity or lack of fidelity to the interests of his clients—conduct which demonstrates a moral culpability wholly absent here. His lack, rather, seems to have stemmed from a temperament which led to such excess of zeal in representing his clients that it obscured his conception of responsibility as an officer of the court. Thus the very qualities which in my judgment make him particularly well qualified to remain a member of this Bar also will be unfortunately in commercial fields where competitive effort is an addition to the essential respect of an officer of the Court. For instance, in competition a man's honor, his sense of personal advantage as a principle I should expect that he would be a trustworthy and highly efficient representative. In the setting of the Court room it is plausible to believe that an acute competitive instinct guided him as he so ably sought to shield the conduct of other lawyers in the case even less restricted than himself. As observed in the text of the above memorandum, unethical practices are indeed contagious. But this possibility is sufficiently reflected in my holding on Paragraph 14 wherein I save him from responsibility for the conduct of others; it does not serve to shield his personal, professional misconduct.

Memorandum of Decision of Hincks, U. S. D. J.

and that Mr. Insarman should be suspended from membership for the period of two years.

I cannot fittingly close this memorandum without a word of thanks in behalf of the Court to the Bar Associations whose sense of responsibility and whose concern for the good name of the legal profession and for the standards of the Bar of this Court led them to present the pending petition. And thanks are particularly due to the petitioners' counsel who has carried the great burden of prosecuting the petition with vigor, thoroughness and fairness. Truly, the assumption and performance of that unpleasant task was a service in keeping with the highest traditions of the legal profession which deserves the gratitude of the entire Bar and the unqualified commendation of the Court. I will make a final call upon his good offices by asking that he submit forthwith for entry appropriate orders giving effect to the conclusions just stated.

Dated at New York in the Southern District of New York this 3d day of January, 1932.


C. C. Hincks,

United States District Judge.

**Appendix to Affidavit of F. W. H. Adams
of January 17, 1950**

In the affidavit of F. W. H. Adams, duly sworn to on the 17th January, 1950, and submitted in support of the petition herein, reference was made to certain portions of the transcript of proceedings in the case of the *United States v. Dennis et al.* The references were to the Challenge Transcript (Ch. Tr.) and the Trial Transcript (Tr.). Subsequent to the time when the petition and affidavit of F. W. H. Adams were prepared, the record in the *Dennis* case was printed and a copy thereof will be submitted to the Court on the bearing in the above-entitled proceeding. For the convenience of the Court, in the compilation that follows the references to the Challenge Transcript and Trial Transcript have been converted to references to the appropriate volume and page of the printed record. This table is arranged by paragraph and column so as to correspond to the paragraphs and columns in said affidavit of F. W. H. Adams.

[SCHEDULE ANSWERED]

(Opposite) 

Vol.	Page	Vol.	Page	Vol.	Page	Vol.	Page
1	300-01	4	2541				
1	304-05	4	3044	8	6262-45	12	9185
2	308-34	4	3316-17	8	6267	12	9343-45
2	1000-06	6	4177	8	4411	12	9403-05
2	1004-99	6	4699	8	4761	12	9433-41
2	1070-91	6	4701	8	7094	13	9386-87
2	1361	6	4804-07	8	7269-70	14	11213
2	1641-71	7	5499-30	9	9450	15	11419
3	2077-2108						
3	2381-85					15	12064
3	2404						
3	2592						

Vol.	Page	Vol.	Page	Vol.	Page
1	304-05	2	1561	4	2641
1	931-3	2	1641-71	4	2943
2	1033-38	2	1813	4	3013
2	1039	2	1813-14	4	3046
2	1054-99	2	2086-87	15	11431
2	1131-42	2	2087		
2	1366	2	2084-85		
2	1452	2	2404		
2	1498	2	2490-91		
		2	2538-39		

Vol.	Page	Vol.	Page	Vol.	Page	Vol.	Page
2	1042-99	4	2613-16	6	4852-93	12	8969-70
2	1084	4	2616-71	7	5028	12	8999-01
2	1086-07	4	2791-97	7	5153-95	12	9220
2	1088-12	4	3046-3000	7	5456	12	9376-77
2	1131-12	4	3076-17	8	6120-22	12	9403-05
2	1171-15	4	3066-65	8	6365	12	9503-06
2	1403	4	3071-72	8	6761	12	9533-41
2	1572-73	4	3072	8	6834-77	12	9640-80
2	1577-25	4	3074-75	8	6842-43	12	9751-52
2	1593-03	4	3081-99	8	6800-01	12	9884
2	1593-72	4	3089	8	6934-77	12	10054
		4	3091-92				
		4	3093-94				
		4	3095-96				
		4	3097-98				
		4	3099-100				
		4	3101-102				
		4	3103-104				
		4	3105-106				
		4	3107-108				
		4	3109-110				
		4	3111-112				
		4	3113-114				
		4	3115-116				
		4	3117-118				
		4	3119-120				
		4	3121-122				
		4	3123-124				
		4	3125-126				
		4	3127-128				
		4	3129-130				
		4	3131-132				
		4	3133-134				
		4	3135-136				
		4	3137-138				
		4	3139-140				
		4	3141-142				
		4	3143-144				
		4	3145-146				
		4	3147-148				
		4	3149-150				
		4	3151-152				
		4	3153-154				
		4	3155-156				
		4	3157-158				
		4	3159-160				
		4	3161-162				
		4	3163-164				
		4	3165-166				
		4	3167-168				
		4	3169-170				
		4	3171-172				
		4	3173-174				
		4	3175-176				
		4	3177-178				
		4	3179-180				
		4	3181-182				
		4	3183-184				
		4	3185-186				
		4	3187-188				
		4	3189-190				
		4	3191-192				
		4	3193-194				
		4	3195-196				
		4	3197-198				
		4	3199-200				

J.	Vol.	Page	Vol.	Page	Vol.	Page
	2	1093-96	9	9941-49	8	6401-09
	2	1406	9	9944	9	7165-46
	3	2342-44	9	1013	11	8482
	3	2369-73	6	4441-45	12	9478-79
			6	4903	13	10341-44
			6	4608-09	14	10951-52
			6	4860-61	14	10982-83
			7	5095-96	14	11012-13
			7	5378-79	14	11253-55

K.	Vol.	Page	Vol.	Page	Vol.	Page
	2	1181-83	10	7643-77	13	10544-45
	2	1218-18	12	9318-20	14	10743-49
	3	2342-44	13	10084-86	14	11269-72
	3	2369-73	13	10164-70	15	11680-87
			13	10341-44		

L.	Vol.	Page	Vol.	Page
	3	2277-78	15	12041-45

Vol.	Page
12	9429
14	10569-71

M.	Vol.	Page	Vol.	Page	Vol.	Page	Vol.	Page
	1	331-34	4	3571	9	4803-04	12	9403-05
	1	343-39	4	3238-40	9	4815	12	9533-41
	1	421-32	4	3241-43	9	4844-54	12	10227-28
	1	455	5	3641-61	9	4847	12	10947-44
	2	1075-38	5	4028	9	7024-31	15	10995
	2	1054-59	5	4039	9	7084-87	12	10514-17
	2	1088-94	6	4228-29	10	7654-57	14	10715-17
	2	1379-80	6	4787-88	10	7929-30	14	10718-19
	2	1433	6	4805-06	10	8045	14	10748
	2	1647	7	4862-65	11	8497-98	14	10841
	2	1661-71	7	4947-50	11	8533-34	14	10947-48
	3	1770-71	7	5295-96	11	8792-94	14	10970-71
	3	1937-35	8	5821-22	11	8767-70	14	10975
	3	1973	8	5909-04	11	8887-91	14	11101
	3	2091-92	8	5913-14	11	8894-96	14	11213
			8	5971	11	8940	15	11262
			8	6343-45	11	8943-43	15	11418-22
			8	6367-70	12	9044-46	15	11432
			8	6408-08	12	9151	15	11485
			8	6445	12	9167-68	15	11843-43
			9	6701	12	9209	15	11851
			9	6798-91	12	9222-25	15	11921-22
							15	12016-17

Paragraph 15:

II	Vol. 1, pg. 504
III	Vol. 1, pg. 623-24
IV	Vol. 2, pg. 1048-52
	" 2, " 1052-60
	" 2, " 1055
	" 2, " 1055
	" 2, " 1059
V	Vol. 2, pg. 1085-88
	" 2, " 1088
	" 2, " 1089
	" 2, " 1089
VI	Vol. 2, pg. 1134
	" 2, " 1134-35
	" 2, " 1136
	" 2, " 1137
	" 2, " 1138
VII	Vol. 2, pg. 1540
	" 2, " 1561
VIII	Vol. 2, pg. 1574
	" 2, " 1575
	" 2, " 1610
	" 2, " 1610
	" 2, " 1637
	" 2, " 1641
IX	Vol. 3, pg. 2328
	" 3, " 2328
X	Vol. 4, pg. 2440
	" 4, " 2643-44
XI	Vol. 4, pg. 3046-47
XII	Vol. 5, pg. 3494-95
XIII	Vol. 5, pg. 3586-89
XIV	Vol. 5, pg. 4034-39
XV	Vol. 6, pg. 4224-29
XVI	Vol. 6, pg. 4787-88
XVII	Vol. 6, pg. 4724
XVIII	Vol. 6, pg. 4701
XIX	Vol. 6, pg. 4807
XX	Vol. 6, pg. 4829-34

XXI	Vol. 7, pg. 4962-49
	" 7, " 4967
	" 7, " 4967
	" 7, " 4968
XXII	Vol. 7, pg. 5528-38
	" 7, " 5539
XXIII	Vol. 8, pg. 6411
XXIV	Vol. 9, pg. 6565
XXV	Vol. 8, pg. 6344
XXVI	Vol. 9, pg. 6847
XXVII	Vol. 9, pg. 6937
	" 9, " 6937
	" 9, " 6937
	" 9, " 6937
XXVIII	Vol. 9, pg. 7094
XXIX	Vol. 9, pg. 7087
	" 9, " 7087
	" 9, " 7087
	" 9, " 7087
XXX	Vol. 10, pg. 8045
XXXI	Vol. 12, pg. 9403
	" 12, " 9403-05
XXXII	Vol. 12, pg. 9731
XXXIII	Vol. 14, pg. 10853-55
	" 12, " 10853-54
XXXIV	Vol. 14, pg. 11213
XXXV	Vol. 15, pg. 11432
XXXVI	Vol. 15, pg. 12096-97

Paragraph 16:

Vol.	Page	Vol.	Page	Vol.	Page	Vol.	Page
1	97	4	2638	6	4534-35	11	8976-77
1	292-93	4	2640-41	6	4536-37	11	8978-79
1	1077-78	4	2647-48	6	4540-42	11	9121
2	1089-90	4	2943	7	5095	11	9267-68
2	1137-38	4	3138	7	5157-58	11	9269
2	1174-75	4	3210-12	7	5488	11	9280
2	1182-83	4	3213	7	5899	11	9282-83
2	1366	4	3323	8	6114-15	11	9284
2	1482-84	4	3361-62	8	6264	11	9381-82
2	1497-98	5	3425-27	8	6368	11	9384
2	1961	5	3494-96	9	6369	11	9386-87
2	1972-73	5	3588	9	6934-37	11	9389
2	1466-67	5	3681	9	7029	11	9390
2	1882-83	5	3742-43	10	8048	11	11423-24
2	1929	5	3766-71	10	8051-52	11	11425-26
2	1977-79	5	4089	11	8476-77	11	11892
2	2084-86	5	4288	11	8533-34	11	11896
2	2478-79	5	4303				

Paragraph 17:

- I Vol. 12, pg. 9376
- II Vol. 12, pg. 9322-34
- III Vol. 12, pg. 9341-42

Paragraph 18:

Vol.	Page	Vol.	Page	Vol.	Page	Vol.	Page
10	7625	10	7625	10	7625	10	7625
11	7647	11	7647	11	7647	11	7647
12	9376	12	9376	12	9376	12	9376
13	9317-18	13	9317-18	13	9317-18	13	9317-18
14	10741-46	14	10741-46	14	10741-46	14	10741-46
15	10716-17	15	10716-17	15	10716-17	15	10716-17
16	10841	16	10841	16	10841	16	10841

Order of Disbarment Appealed From**(Filed—January 11, 1952)**

This proceeding came on to be heard before me on December 20, 1950 and, after due consideration, an opinion of this Court was filed on January 4, 1952, and it is

ORDERED that the respondent Harold Sacher, also known as "Harry" Sacher, be and he is hereby permanently disbarred from the Bar of this Court, and that his name be stricken from the roll of the attorneys authorized to practice in this Court, and it is further

ORDERED that the Clerk of this Court make an entry to the foregoing effect upon the rolls of attorneys of this Court.

January 10th, 1952.

**C. C. HINCKS,
U. S. D. J.**

Notice of Appeal

(Filed—January 12, 1952)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of

HAROLD SACHER, also known as "HARRY" SACHER,
and ABRAHAM J. ISSERMAN,

Attorneys

Notice is hereby given that Harry Sacher, one of the respondents above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order permanently disbarring him from the Bar of the United States District Court, Southern District of New York, entered in this proceeding on the 11th day of January, 1952.

HARRY SACHER

Attorney Pro Se

Office & P. O. Address
342 Madison Avenue
Borough of Manhattan
City of New York

Copy to be mailed to:

F. W. H. ADAMS Esq.
Attorney for Petitioners
Office & P. O. Address
49 Wall Street
New York 5, N. Y.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 183—October Term, 1952.

(Argued March 9, 1953)

Decided July 6, 1953.)

Docket No. 22302

In the Matter

of

HAROLD SACHER, also known as "HARRY" SACHER, and
ABRAHAM J. ISSERMAN,*Attorneys.*ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK and
NEW YORK COUNTY LAWYERS' ASSOCIATION,*Petitioners-Appellees,*

and

HAROLD SACHER, also known as "HARRY" SACHER, 
an Attorney,*Respondent-Appellant.*

Before:

AUGUSTUS N. HAND, CHASE and CLARK,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Carroll C. Hincks, Judge

From an order of disbarment for professional misconduct, the respondent appeals. Affirmed.

F. W. H. ADAMS, *Attorney for Petitioners-Appellees*; F. W. H. Adams, William C. Scott and Philip C. Smith, of counsel.

HARRY SACHER, *Respondent-Appellant, pro se.*

AUGUST N. HAND, *Circuit Judge:*

This is an appeal from an order disbaring the respondent for professional misconduct while the jury was being selected and during the course of the trial of the communist leaders, who had been indicted under the "Smith Act," 18 U. S. C. A. §2385, for advocating the overthrow of the government of the United States by force and violence, *United States v. Dennis, et al.*, 2 Cir., 183 F. 2d 201, affirmed 341 U. S. 494. The present proceeding was commenced by the service of an order to show cause issued upon a petition by the Association of the Bar of the City of New York and the New York County Lawyers Association. On the trial before the District Court sitting without a jury the only evidence introduced was the record of the trial and the preliminary proceedings in the *Dennis* case—the respondent offered no testimony on his behalf. In a carefully considered opinion Judge Hincks held that the instances of misconduct shown by this record required Sacher's disbarment, although the judge stated: "I find in the entire record no intimation that his conduct was tainted by venality or lack of fidelity to the interests of his clients,—offenses which demonstrate a moral turpitude

wholly absent here. His fault, rather, seems to have stemmed from a temperament which led to such excess of zeal in representing his clients that it obscured his recognition of responsibility as an officer of the court. Thus the very qualities which in my judgment make him professionally unfit to remain a member of this Bar might well be unobjectionable in commercial fields where competitive effort is not subject to the restraints required of an officer of the Court. For instance, in negotiations * * * I should expect that he would be a trustworthy and highly effective representative. * * *

Paragraph 15 of the petition of the Bar Associations charged 36 instances of improper conduct, of which the court held 28 had been proved, requiring disbarment. Two of the specifications were discussed in detail by the District Court as evidencing particularly serious misconduct and have been emphasized on this appeal by the respondent as influencing the discipline imposed. One related to the continuation of a cross-examination by Sacher which the court permitted under what the respondent knew to be a misapprehension of facts which he failed to correct. The charge was held not to have been sufficiently established in the contempt proceedings against the respondent, see 182 F. 2d 424-25, and he argues that therefore it cannot be said to have been sufficiently proved here. But in this proceeding, as the judge below pointed out, Sacher did not deny the allegation that he knew of the judge's misapprehension, and did not seek to avail himself of his opportunity to testify. Although the burden of proof is on the petitioners, the accused attorney owed the court the greatest frankness in a proceeding such as this. Cf. *Matter of Ransel*, 158 N. Y. 216, 221. We are not impressed by Sacher's argument that he did not have to deny this allegation since it was a conclusion of law, and we agree with the court be-

low that his failure to correct the trial judge's misapprehension was a violation of his professional duty.

The second instance that was stressed by Judge Hincks was the respondent's remark: "They [the early Christians] did so many things, more than this evidence disclosed, that if Mr. McGohy were a contemporary of Jesus he would have had Jesus in the dock." Even if this remark was not quite such a serious breach of professional ethics as Judge Hincks thought (see Canon 17 of the American Bar Association's Canons of Professional Ethics), since the intended import may have been only that if the United States Attorney prosecuted secret groups now the same logic would have required him to have done so had he lived when Jesus did, it was capable of misapprehension. When its purpose and effect were evidently misunderstood as an attack upon the opposing counsel's religion, Sacher clearly should not have refused to apologize or explain.

In any event disbarment was decreed on other independent grounds which we believe fully justified the order. Two types of conduct alleged in Paragraph 16 of the Bar Association's petition were each held to require that the respondent be no longer allowed to practice before the court. This paragraph charged that Sacher "persistently, in disregard of the repeated warnings and orders of the Court, argued without permission; [and] refused to desist from argument and comment" and that he made "insolent, sarcastic, impertinent and disrespectful remarks to the Court and conducted himself in a provocative manner." For a few examples of respondent's conduct see our opinion in *United States v. Sacher*, 2 Cir., 182 F. 2d 416, at p. 423-24, affirmed 343 U. S. 1. The court further found that, although the charge in Paragraph 14 of the petition that a conspiracy had existed with other counsel representing other defendants to obtain specified improper objectives by improper trial conduct was not established, treating the al-

legations of a conspiracy as surmount the proof of individual misconduct alleged in Paragraph 14 required disbarment. These charges were of substantially the same nature as those for which disbarment was ordered under Paragraph 16.

Basically the respondent's argument is that in view of his previous unpublished record disbarment is too severe a discipline to impose for conduct in part brought on by the demands of an unusual and important trial which took place in an atmosphere of hostility toward the defendants. He further maintains that instances of properly conducting himself subsequent to the *Dennis* trial established that the court's finding that his recalcitrance is congenital, so that similar misbehavior could be expected in the future, was clearly erroneous. The extraordinary nature of the trial was considered by the district court, and we agree that it provided no excuse for the many instances of misconduct of which the respondent was guilty. We think that it was incumbent on him not to have impeded the trial's progress in the ways that he evidently sought to do. Nor did the judge err in anticipating a repetition of such tactics if the respondent felt that they would be to his advantage, for he persisted over an extended period in his defiant and disorderly ways in the face of repeated warnings by the court.

The purpose of striking an attorney from the rolls of a court is not to punish him but to protect the court itself and relieve the public of a member of the legal profession, who is unfit to serve as such, in order to maintain the respect due the court by insuring that attorneys, who are "officers of the court," are of good professional character. See *Matter of Rouss*, 221 N. Y. 81, 85. Because the consequences of disbarment are necessarily severe, it is a measure to be exercised only for compelling reasons. See *Ex parte Wall*, 107 U. S. 265, 288. In the case at bar we think that the proved instances of unprofessional conduct,

constantly repeated in the face of the court's admonitions, and continuing during a trial of extended duration, clearly demonstrated a lack of respect for the court and constituted a serious obstruction to the administration of justice. It is evident that the respondent either was unable to comprehend his obligations to a court of law or was unwilling to fulfill them when he felt it inexpedient to do so. Even if a less severe measure of discipline might have been imposed, we do not find any abuse of discretion in disbarring the respondent from practice such as was found to exist in *In re Doe*, 2 Cir., 55 F. 2d 386. See *In re Chopak*, 2 Cir., 160 F. 2d 886, 887, cert. denied 331 U. S. 835.

Order affirmed.

CLARK, Circuit Judge (dissenting):

In a proceeding against another lawyer caught in this same legal tangle, four justices of the Supreme Court, after pointing out that the charge by the judge in the *Devine* trial of a deliberate conspiracy to obstruct justice was found to lack support in the evidence both in the contempt case and in this present disciplinary proceeding, said: "What remains is a finding that he was guilty of several unexplained consummated outbursts during a long and bitter trial." They continued: "Perhaps consciousness of our own short patience makes us unduly considerate of the falling tempers of others of our contentious craft. But to permanently and wholly deprive one of his profession at *Isserman's* time of life, and after he has paid so dearly for his fault, impresses us as a severity which will serve no useful purpose for the bar, the court or the delinquent." *In re Isserman*, 345 U. S. 286, 294.

Four other justices rested their contrary decision on the procedural rule of the Court requiring that a member of its bar who has been disbarred from practice in any state should be disbarred before it unless he showed good cause

to the contrary. That rule operated by reason of Isserman's disbarment by the highest court of New Jersey to put a burden upon him which he had not met. Since the justices were equally divided (one justice not sitting), the operation of this burden against him led to his disbarment by the narrowest of all possible margins. Here there are several significant differences favorable to this respondent, which I should think render this an *a fortiori* case for reversing the harsh doom visited upon him below.

First, no procedural rule here operated against respondent; on the contrary, there is a definite one in his favor. For as the majority opinion herewith correctly points out, the burden of proof was definitely on the petitioning associations. Second, there are the differing situations out of which these procedural rules stem. As the Supreme Court points out, it will follow a state court ruling of disbarment "in the absence of some grave reason to the contrary." 345 U. S. at page 288. Under such circumstances disbarment in the district court below would be automatic. General Rule 5(b) of the United States District Courts for the Southern and Eastern Districts of New York. Considerations of convenience, of fairness to litigants, and of the dignity of the federal courts support such comity. But here the courts of New York have not spoken. Since state proceedings would go immediately before the bench of the First Department, Appellate Division, N. Y. Judiciary Law §90, subd. 2, we here lack the conviction which action pro or con by that distinguished tribunal would afford us. Perhaps the state courts are waiting on our decision; but that only makes our responsibility the heavier.

Finally, two further considerations suggest important differences on the record in the case histories of the respective counsel. Respondent here had 24 years of unblemished professional conduct in the state and federal courts before his entry on the famous trial. On the other

hand, Isserman had been previously convicted of a crime and suspended for a time from practice. In the Supreme Court there was dispute as to how much weight should be accorded these facts; the warmth of the dispute suggests, however, that they did assume considerable importance. Further, on the crucial question of conduct in the four years subsequent to the trial, the justices apparently had little information on Isserman; the dissent does speak well of such personal appearances as he had previously made before them. But as to Sacher we have all this and substantially more. In addition to appearing in his own behalf, this respondent has appeared below and before us in cases of some difficulty where not only has his conduct been uniformly courteous and dignified, but his professional ability of unusually high order, as we have pointed out. *United States v. Hall*, 2 Cir., 198 F. 2d 726, 727, 730, certiorari denied 345 U. S. 905, on appeal from D. C. S. D. N. Y., 101 F. Supp. 666, where the record showed commendation also by the district judge; *U. S. ex rel. Nukk v. District Director of Immigration and Naturalization*, 2 Cir., June 17, 1953. Were we to select a public defender, we could hardly do better than seek respondent's services in cases of this type where it is difficult to secure able representation and will undoubtedly become more so in consequence of decisions such as this.

Indeed, everyone seems to concede, though an argument against respondent is made on the very concession, that respondent, a lawyer of ability, knows how to conduct himself in his profession and can do so if he feels the need. The fear is expressed that such conduct cannot "safely" be relied upon; but since we do not have here the remotest intimation of danger to clients by defrauding or otherwise, this must be a fear that district judges hereafter cannot control their courtrooms with respondent present. For my part I repudiate this idea. It seems

to me that respondent, after his searing experience including a severe sentence of imprisonment, gives good earnest of proper professional conduct, and that our judges are quite capable—if need there be—of exercising the proper degree of firmness and dignity necessary for the fitting conduct of judicial business.

This, therefore, seems to me a quite unnecessary and ill-fitting example of judicial harshness which apparently does trouble my brothers, judging from the sense of apology with which the sentence is affirmed. I cannot believe that this can stand as the final action of the courts in the premises, or that an application for reinstatement will not meet with more favor when the present atmosphere of hysteria has somewhat abated.

Having thus briefly discussed the particular fate of this respondent, perhaps I should stop here. But since I feel most deeply that involved are more than the vicissitudes of one individual, but the honor and reputation of the federal courts for sober impartiality, a fuller analysis of the legal basis for this decision seems impelled. Before I turn to the facts, I must raise two important questions of law as to which I think the majority holding is erroneous. The first is in treating this case as one primarily within the discretion of the district court. And the second is in disposing of this important question, touching as it does the integrity of the court, by a panel, and not the full court.

Treating the last matter first, on the appearance of *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U. S. 247, 260, 274, with at least an implication of criticism of our practice of never sitting *en banc*, it seemed to me that an issue appropriate to be disposed of by the full bench was here presented. Accordingly I asked the Chief Judge to poll the court, which he did; of the active judges available to sit in this case, three voted against sitting *en banc* and two for it. Consequently my request was not given

effect; and decision here, involving, as I believe, errors of law and of fact, is by only a minority of the court. That I believe is not right.

Now considering the responsibility of this court on appeal, I do not wish to convey any criticism of Judge Hincks, who sat in this case as a designated visiting judge and who acted with dignity and devotion. But these very circumstances seem to point the more to the ultimate responsibility which should be ours and the wisdom of the New York law, cited above, requiring the proceedings to go at once to the appellate court. The difficulties of Judge Hincks' position, called upon as a visitor to weigh in considerable part the criticized actions of a fellow, albeit local judge, are obvious. He never should have been placed in such a position. His concern is clear; it led him to what I believe may be termed a leaning over backwards in both directions to make markedly favorable fact findings for respondent and then like legal conclusions for the petitioners and thus for his brother judge and court. For so we have the result—surely anomalous and not duplicated elsewhere in the precedents—of absolute disbarment of a lawyer whose conduct has no taint of "venality or lack of fidelity to the interests of his clients," but only an "excess of zeal in representing his clients" or qualities "unobjectionable in commercial fields" or making him in negotiations "a trustworthy and highly effective representative." There must be something topsy-turvy when in "our contentious craft"—to use the Supreme Court's apt expression—a lawyer loses his profession permanently for displaying those very qualities most often associated with it. I do not believe that can be the law.

For the law, I believe, is rather clear. The fundamental principle is aptly stated in *Bradley v. Fisher*, 13 Wall., 80 U. S., 335, 355, thus: "A removal from the Bar should, therefore, never be decreed where any punishment less

severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired.” So we have implicitly recognized that open, and hence controllable, misconduct at a trial where no venality was involved would not warrant disbarment when we said in *In re Doe*, 2 Cir., 95 F. 2d 386, 387: “Disbarment is fitting only when the attorney has been guilty of corrupt conduct; of some attempt to suborn a witness, or to bribe a juror, or to forge a document, or to embezzle clients’ property, or other things abhorrent to honest and fair dealing.” These are upper court rulings; the appellate courts seem without question to accept the responsibility which should be theirs and to reverse freely where the penalty of disbarment is considered too severe. See also *In re Patterson*, 9 Cir., 176 F. 2d 966; *Bartos v. United States District Court for Dist. of Nebraska*, 8 Cir., 19 F. 2d 722; *In re Fisher*, 7 Cir., 179 F. 2d 361, certiorari denied *Kerner v. Fisher*, 340 U. S. 825. Here is no question of evaluating the credibility of witnesses; in fact everything turns upon the printed transcript of the *Dennis* trial, with which we have a familiarity by repeated exposure somewhat more extensive than had the visiting trial judge. And so if the penalty is too severe here, it is our legal duty and responsibility to take action to correct it.

Thus I come once more to the occurrences at the *Dennis* trial and their bearing upon the judicial process operating through the medium of Anglo-Saxon procedure. When that trial was planned, it seemed that it might well afford a demonstration, of world-wide interest, of the capacity of American courts to show evenhanded justice to all litigants even under the difficult circumstances of a mass trial involving matters of opinion. At its conclusion, although its course had been marred by certain boisterous incidents, it seemed that considerable satisfaction was possible with an outcome reached under the peculiar difficulties present.

But that assurance was soon dispelled when the trial judge took the unprecedented course of summarily sentencing the defense lawyers, without trial or hearing, to substantial terms of imprisonment for their conduct during the trial and for a conspiracy to obstruct justice which he concluded existed. This overshadowed at once all the fine and persistent efforts of the prosecution in preparing and conducting so hard a case. But more, it raised the insistent question whether the judge's action did not appear more of a vindictive than a judicial nature. Nevertheless he was sustained by divided judicial votes on most of his substantive charges, the conspiracy charge falling. But whatever the strict legal merit of these decisions, they held far more immediate popular appeal than sober professional approval; and the doubts which have permeated the scholarly legal field¹ suggest the unwisdom for other judges to try so summary a course.

Hence even were there nothing more in the record to soften an otherwise deserved condemnation of the lawyers' conduct, I should still feel a judgment of disbarment should not stand. As already stated, this decision depends absolutely on the record made in the contempt case; nothing new has been brought out against the respondent and nothing elsewhere has been allowed to operate in his favor. Even at the time of the judgment of contempt, the fiery occurrences at the trial were receding into the past. Of the 22 incidents charged against this respondent (in addition to

¹ For critical comments, see 2 Buffalo L. Rev. 153; 37 Conn. L. Q. 795; 66 Harv. L. Rev. 170; 12 Law. Guild Rev. 39; 36 Minn. L. Rev. 265; 31 Ore. L. Rev. 80; 34 So. Calif. L. Rev. 112; 2 Stn. L. Rev. 763; 99 U. of Pa. L. Rev. 540; 6 Vand. L. Rev. 120; 62 Yale L. J. 389, 319; Frank, *United States Supreme Court: 1951-52*, 20 U. of Chi. L. Rev. 1, 43-47; Harper and Haber, *Lawyer Troubles in Political Trials*, 60 Yale L. J. 1; and see also Whitty, 14 Mod. L. Rev. 89, and Stubbs, 30 Can. B. Rev. 643. For eulogatory comments see 38 A. B. A. J. 304; 7 The Record 192, 305 [1952] U. Ill. L. Forum 200; 36 Va. L. Rev. 957.

the general charge of conspiracy) 6 occurred before the jury trial started; and the disturbances appear to have lessened as the trial went forward, the last one cited being a month before the close of the trial.² To rekindle the heat of courtroom altercations some years after to justify permanent disbarment is itself a somewhat dubious practice; but I suggest that the unconvincing character of the incidents picked out for stress below and here points to the general undesirability of so extensive a retribution for this type of conduct.

The first of the two instances noted by the majority is respondent's cross-examination of a witness as to pleas of guilt to criminal charges in order to impeach his credibility. In the contempt proceedings we held unproven the charge that respondent continued the cross-examination when it was permitted by the court under what he knew to be a misapprehension of the facts which he failed to correct. *United States v. Sacher*, 2 Cir., 182 F. 2d 416, 424-5, affirmed *Sacher v. United States*, 343 U. S. 1. But curiously that unproven charge is now brought back and used against respondent on a theory of implied admission by failure to indulge in some formal pleading denial. This seems to me to be building an artificial case on so formal and technical a ground as to be really distressing. It is perfectly obvious that this proceeding rests wholly on the contempt

2 See *United States v. Sacher*, 2 Cir., 182 F. 2d 416, 431, 464, n. 1, 465, n. 4. There seems to have been a drying up of outward incidents by the defendants after the judge exercised firmness toward the lay accused in June after 2½ months of trial. Of course there will always remain the question whether firmness toward counsel, exercised at an early date, even before the jury trial started, would not have solved many problems. It has been urged that the trial judge was wise in avoiding the chance of mischief by refraining from earlier action. But, as a justification for later retributive action, this seems wholly irrelevant; the case had gone to a conclusion, and speculation on what might otherwise have happened cannot affect that outcome. See 182 F. 2d at page 465, 343 U. S. at page 21.

charges and order entered against respondent by the original trial judge and that the present action would never have been brought without them. To say then that such of the contempt charges as have been eliminated by careful and formal appellate adjudication must again be separately denied so as not to avail the petitioners here is to employ the most regressive and questionable form of procedural technicality to destroy a man's livelihood. The merits of this particular charge are not now re-examined by the majority; so far as they appear available to us, our previous decision seems more in accord with the facts than our present one.³

The other incident which affected the judge below more than my brethren here was respondent's remark that if the United States Attorney "were a contemporary of Jesus he would have had Jesus in the dock." This seems to have been first stressed as antireligious in tone. Obviously it is not. It is rather an example of the not uncommon practice of citing historical allusions to reflect upon the merits of the charges being litigated; that this allusion took a somewhat provocative form indicates only a possibly ill-advised attempt at emphasis.⁴ Considering the prosecutor's reaction, an apology later would have tended to greater brotherly accord among counsel. But to make its lack a basis for disbarment seems to me an incredibly unreal

³ It appeared that the witness had withdrawn pleas of guilt to the charge of carrying concealed weapons, to receive later acquittals; respondent's contention is that he wanted to show the witness' appearance and testimony induced by promises of such reward.

⁴ See the comment of Professor Countryman of Yale University, 174 The Nation 641, June 26, 1952: "Thirty-two years ago, in another Communist prosecution, Clarence Darrow charged that the prosecutor 'would have sent Christ to jail just the same as you would these defendants.' For the comparative claim of the 1920 Red hunt no one thought of disbarring Darrow or holding him in contempt. And the bar weathered many more years of his zealous arguments for the defense."

approach to realities of criminal trials in this country. Certainly one whose business in life is to scan trial records can hardly display a shock of surprise at this comparatively trivial incident compared to what occurs in many a trial without later reprisals.⁵

Beyond all this, however, there still remains a consideration suggesting amelioration of penalty, to which I must advert—touching as it does the honor and prestige of the court—no matter how much I personally should like to avoid doing so. It is now well known that there has been criticism in the highest circles of the judicial conduct of the *Dennis* case on the ground that the judge himself engaged in the altercations with counsel and even to a certain extent promoted them. 343 U. S. 14-89.⁶ I do not want to recount the details which I had hoped could soon be forgotten; and I can find sympathy for the elements of provocation apparent.⁷ But as the judge is held to have accepted the provocation at the time, so by that much he and those who agree with him are behooved to tolerate some recipro-

5 As the opinion points out, of 36 instances of specific acts of alleged misconduct in the *Dennis* record, the district court found 25 supported. It is difficult to see how the 11 he found not proven differed materially in nature, intent, or consequence from those supported; the nuances of differentiation relied on suggest the somewhat ephemeral nature of the changing human conduct under stress here so drastically penalized.

6 See also 66 Yale L. J. 1 and other citations in note 1 *supra*.

7 Moreover, I certainly have no wish to defend the conduct of the attorneys; nor have I ever. This is what I hoped was a careful choice of words I said: "To one schooled in Anglo-Saxon traditions of legal decorum, the resistance pressed by these applicants on various occasions to the rulings of the trial judge inevitably appears abominable." 182 F. 2d at page 463. This limitation of judgment to the one series of incidents arising out of trial rulings was not an over-all characterization of the applicants as members of the bar, as apparently assumed. *cf. In re Lascruces*, 9 N. J. 269, 87 A. 2d 903, 904; the procedural occasion for the altercations is a necessary and important element to be recalled when the issue is as to the weight of the punishment to be inflicted.

cal lack of restraint from the attorneys and refrain from continued retributive actions against them. We do not need even to formulate or express criticisms of the human mortals who participated in this drama to feel that the circumstances now make most undesirable so sharp a judgment as this. For our courts should be, like Caesar's wife, above suspicion; in my judgment they are strong enough by virtue of a solidly achieved reputation for fairness, poise, and impartiality to afford avoidance of any appearance of vindictiveness or prejudice. The events of the *Drainis* trial touched the judge so closely, as the authorities just cited show, that retribution initially started at his hands can only appear to many to be vindictive, and later affirmations timorous and protective. I do not believe our courts should give occasion for so nearly merited a shadow on their good repute. Under the circumstances a grant of mercy here would show the courts great in tolerance and human understanding, and consequently in strength; but they stand to gain nothing, certainly with the discriminating, beyond a sacrifice of confidence, if they allow vindictive harshness to control their actions. In short, why must the most serious wounds to justice be self-inflicted?

I would reverse.

UNITED STATES COURT OF APPEALS

FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of July one thousand nine hundred and fifty-three.

Present:

HON. AUGUSTUS N. HAND

HON. HARRIE B. CHASE

HON. CHARLES E. CLARK

Circuit Judges.

In the Matter
of
Harold Sacher, also known as
Harry Sacher,
and
Abraham J. Isserman,
Attorneys

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL CLERK

**UNITED STATES
COURT OF APPEALS**

**FOR THE
SECOND CIRCUIT**

**In re
Harold Sacher, etc.
and
Abraham J. Isserman**

183

JUDGMENT

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

FILED JULY 6 1953

ALEXANDER M. BELL CLERK

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

In the Matter

of

HAROLD SACHER, also known as "Harry"
Sacher, and ABRAHAM J. ISSERMAN,
Attorneys,

ASSOCIATION OF THE BAR OF THE CITY OF
NEW YORK and NEW YORK COUNTY
LAWYERS' ASSOCIATION,

Petitioners-Appellants,

and

HAROLD SACHER, also known as "Harry"
Sacher, an Attorney,
Respondent-Appellant.

No. 183

October Term
1962

Docket No.
22332

**MOTION FOR EXTENSION OF STAY
OF ISSUANCE OF MANDATE.**

Now comes the respondent-appellant in the above-entitled action, by his attorney, and respectfully moves the court to extend the stay, hereinbefore granted by this court, of the mandate on the judgment rendered July 6, 1953. In support of this motion, the respondent-appellant makes the following brief statement of the facts and objects of the motion:

1. On July 6, 1953, a division of three judges of this court (Judges Augustus N. Hand, Chase and Clark), filed an opinion affirming an order of the District Court for the Southern District of New York disbarring respondent-appellant for professional misconduct in connection with his professional representation of defendants during the trial of the case of *United*

States v. Daniels, et al, 183 F. 2d 201 (2 Cir.), affirmed 341 U. S. 494. Judge Clark dissented from the judgment and opinion of the division of this court.

2. On July 30, 1953, this court (per judges Learned Hand, Swan and Frank) granted a motion under Rule 31 of the Rules of this court staying the issuance of the mandate in accordance with the provisions of said Rule 31. Under said Rule 31, issuance of the mandate has thus been stayed until August 19, 1953 and, if respondent-appellant files prior to that date a petition for certiorari in the Supreme Court of the United States, until final disposition of the case by the Supreme Court.

3. On August 6, 1953, respondent-appellant, by his attorneys, filed (a) a motion for extension of time in which to file petition for rehearing, and (b) a petition for rehearing en banc. Counsel for petitioner-appellees has filed an affidavit under date of August 7, 1953, in opposition to the motion for an extension of time. Accordingly, the respondent-appellant's motion and petition, and petitioner-appellees' affidavit in opposition, are now pending before this court. If respondent-appellant's motion for an extension of time is granted, and the proceeding is reconsidered by this court in accordance with the petition for rehearing, the stay granted on July 30, 1953 will, presumably, be unnecessary in view of the reopening of the proceeding in this court.

4. As set forth in the motion for extension of time in which to file petition for rehearing, the undersigned was retained by Mr. Sacher to represent him on July 31, 1953. Respondent-Appellant's counsel's time during the first week of August was fully occupied familiarizing himself with the case and preparing and filing the motion and petition for rehearing mentioned above.

As of this date, only nine days remain in which to prepare, print and file a petition for certiorari in the Supreme Court of the United States; counsel for respondent-appellant respectfully suggests that this period of time is not adequate for that purpose, in view of the circumstances that his connection with the proceeding originated as recently as July 31, 1953. Furthermore, the time for filing a petition for certiorari in the Supreme Court does not expire until October 6, 1953.

5. Counsel for respondent-appellant rejects and denies the unwarranted and unsupported suggestion, in paragraph 5 of the affidavit filed by petitioner-appellees on August 7th, that the purpose of the petition for rehearing, or of this motion, is to protract the litigation.

WHEREFORE, respondent-appellant respectfully requests that the period of time during which issuance of the mandate is stayed be extended, in accordance with the provisions of Rule 31 of the rules of this court, until thirty (30) days after final action by this court upon the motion for extension of time in which to file a petition for rehearing, and, if that motion is granted, upon the petition for rehearing itself.

Dated: New York, N. Y.

August 11, 1953.

Respectfully submitted,

TELFORD TAYLOR

Telford Taylor

Attorney for respondent-appellant

400 Madison Avenue

New York 17, N. Y.

CERTIFICATE OF COUNSEL

I, TELFORD TAYLOR, do hereby certify that I am acting herein as counsel for the respondent-appellant, and that this motion for extension of stay of issuance of mandate is presented in good faith and not for delay.

Dated: New York, N. Y.

August 11, 1953.

TELFORD TAYLOR

Telford Taylor

No. 183—October Term 1952

Docket No. 22302

In the Matter

of

HAROLD SACHER, etc., and ABRAHAM J.
ISSERMAN, Attorneys,ASSOCIATION OF THE BAR OF THE CITY OF
NEW YORK and NEW YORK COUNTY
LAWYERS' ASSOCIATION,*Petitioners-Appellees,*

and

HAROLD SACHER, also known as "Harry"
Sacher, an Attorney,*Respondent-Appellant.***MOTION FOR EXTENSION OF STAY OF
ISSUANCE OF MANDATE.**TELFORD TAYLOR
Attorney for Respondent-
Appellant
400 Madison Avenue
New York 17, N. Y.**MOTION FOR EXTENSION OF STAY OF ISSU-
ANCE OF MANDATE DENIED.**

H. B. C.

A. N. H.

Aug. 14 1953

U. S. C. JJ

I CANNOT AGREE WITH THIS UNNECES-
SARILY HARSH AND PUNITIVE ACTION AND
THEREFORE DISSENT.

C. E. C.

U. S. C. J.

**UNITED STATES COURT
OF APPEALS**

SECOND CIRCUIT

FILED AUG 19 1953

ALEXANDER M BELL, CLERK

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals,
in and for the Second Circuit, held at the United States
Court House, in the City of New York, on the 19th day of
August, one thousand nine hundred and fifty-three.

Present:

HON. HARRIE B. CHASE
Chief Judge
HON. AUGUSTUS N. HAND
HON. CHARLES E. CLARK
Circuit Judges

In the Matter
of
HAROLD SACHER, also known as "HARRY"
SACHER, and ABRAHAM J. ISSERMAN,
Attorneys.

A motion having been made herein by counsel for appel-
lant Harold Sacher, to extend the stay of the issuance of the
mandate heretofore granted by this Court,

Upon consideration thereof, it is

Ordered that the motion for an extension of the stay
of the issuance of the mandate be and it hereby is denied.

ALEXANDER M. BELL, *Clerk*
By

A. DANIEL FUSARO
Deputy Clerk

**UNITED STATES COURT
OF APPEALS
SECOND CIRCUIT**

**In the Matter
of**

HAROLD SACHER & ANO.

ORDER

**UNITED STATES COURT-
OF APPEALS
SECOND CIRCUIT**

FILED Aug 19 1953

ALEXANDER M BELL CLERK

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 183 October Term--1952

Docket No. 22302

In the Matter

of

**HAROLD SACHER, also known as "Harry" Sacher,
and ABRAHAM J. ISSERMAN,**

Attorneys.

**ASSOCIATION OF THE BAR OF THE CITY
OF NEW YORK and NEW YORK COUNTY
LAWYERS' ASSOCIATION,**

Petitioner-Appellees,

and

**HAROLD SACHER, also known as "Harry" Sacher,
an Attorney,**

Respondent-Appellant.

**RESPONDENT-APPELLANT'S PETITION AND
SUGGESTION FOR HEARING EN BANC**

TELFORD TAYLOR
Counsel for Respondent-Appellant
**400 Madison Avenue
New York 17, N. Y.**

Supreme Court of Appeals

Case No. 1000-1000

October 10, 1900

In the Matter

HAROLD SACHS and others vs. JAMES SACHS
and ABRAHAM SACHS

ASSOCIATION OF THE BAR IN THE CITY
OF NEW YORK vs. JAMES SACHS
LAWYERS' ASSOCIATION

and

JACOB S. SACHS and others vs. JAMES SACHS

ASSOCIATION OF THE BAR IN THE CITY
OF NEW YORK vs. JAMES SACHS

RESPONSE TO PETITION FOR
SUGGESTION FOR CHANGE IN BAR

JOHN TAYLOR

Attorney for Respondent

NEW YORK

October 10, 1900

TABLE OF CONTENTS

	PAGE
I—THE SCOPE OF APPELLATE REVIEW IN DISBARMENT PROCEEDINGS	303
II—LACK OF LEGAL BASIS FOR THE DISBARMENT ORDER	307
III—THE CONSIDERATION TO BE GIVEN RESPONDENT-APPELLANT'S PRIOR PUNISHMENT FOR CONTEMPT	310
IV—SUGGESTION THAT THIS PETITION BE CONSIDERED BY THE COURT <i>en banc</i>	313
A. Reasons in Support of the Suggestion	314
B. To Whom the Suggestion of an <i>en banc</i> Hearing Should Be Addressed	315
CONCLUSION	319

CITATIONS

<i>Anderson v. Dunn</i> , 6 Wheat. 204, 277, 231	308
<i>Barnett v. Equitable Trust Co.</i> , 34 F. 2d 916, 920	307
<i>Bartos v. United States District Court</i> , 19 F. 2d 722, 731 (8th Cir.)	304
<i>Bradley v. Fisher</i> , 13 Wall. 335 (1871)	308, 309, 310, 311, 314
<i>Civil Aeronautics Board v. American Air Transport, Inc.</i> , 344 U. S. 4	314
<i>Ex Parte Bronnsall</i> , 2 Cowper 829 (K. B. 1778) ..	310, 311, 315

	PAGE
<i>In re Chopak</i> , 160 F. 2d 886, 887	305, 306, 315
<i>In re Doe</i> , 95 F. 2d 386	305, 306, 309
<i>In re Fisher</i> , 179 F. 2d 361	306
<i>In re Isserman</i> , 345 U. S. 286	308, 309, 310, 314
<i>In re Schachne</i> , 87 F. 2d 887	305, 306
<i>Sinclair v. United States</i> , 279 U. S. 749	306
<i>United States ex rel Nukk v. District Director</i> , decided June 17, 1953 (2d Cir.)	312
<i>United States ex rel Robinson v. Johnston</i> , 316 U. S. 649	314
<i>United States v. Dennis, et al.</i> , 183 F. 2d (2d Cir.) affirmed 341 U. S. 494	303, 312
<i>United States v. Hall</i> , 198 F. 2d 726, 727, 730 (2d Cir.) and 101 F. Supp. 666 (S. D. N. Y.)	312
<i>Western Pacific Railroad Corporation v. Western Pacific Railroad Company</i> , 345 U. S. 472	304, 307, 313, 314, 315, 316, 317, 318

STATUTES AND MISCELLANEOUS

28 U. S. C. § 46(c)	307, 313, 314, 315, 318
<i>Hearing and Rehearing Cases en banc</i> , 14 F. R. D. 91, 96	315, 316

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 183 October Term—1952

In the Matter

of

HAROLD SACHER, also known as "Harry"
Sacher and ABRAHAM J. ISSERMAN,
Attorneys.

ASSOCIATION OF THE BAR OF THE CITY
OF NEW YORK and NEW YORK COUNTY
LAWYERS' ASSOCIATION,

Petitioners-Appellees,

and

HAROLD SACHER, also known as "Harry"
Sacher, an Attorney,
Respondent-Appellant.

Docket No.
22302

RESPONDENT-APPELLANT'S PETITION AND SUGGESTION FOR REHEARING EN BANC

On July 6, 1953, this Court handed down its Opinion in the above-entitled proceeding affirming the Order of the United States District Court for the Southern District of New York, entered January 4, 1952, after a trial before Honorable Carroll C. Hincks without a jury, disbarring the Respondent-Appellant from the Bar of the District Court for professional misconduct in connection with his professional representation of defendants in connection with the trial of *United States v. Dennis, et al.*, 183 F. 2d (2d Cir.),

affirmed 341 U. S. 494. The opinion of the Court, by Judge Augustus N. Hand, was concurred in by Judge Chase; Judge Clark dissented.

Under Rule 28 of the Rules of this Court, a petition for rehearing must be filed within fifteen days from the filing of the opinion of this Court in the Clerk's Office. In this case, the fifteen-day period expired July 21, 1953. On July 31, 1953, the respondent-appellant retained the undersigned as his counsel before this Court and the Supreme Court of the United States. After examination of the opinions of this Court and the prior proceedings herein, it appeared that, in the interests of the respondent-appellant, it would be desirable to file a petition for rehearing, together with the suggestion that said petition be heard before this Court *en banc*. Accordingly, a motion to extend the time for filing a petition for rehearing was prepared, and, as set forth therein and at the suggestion of Judge Clark, is this day being filed simultaneously with this petition for rehearing.

The reasons in support of the petition are set forth below. In accordance with the decision of the Supreme Court of the United States in *Western Pacific Railroad Corporation v. Western Pacific Railroad Company*, 345 U. S. 247 (decided April 6, 1953), it is respectfully suggested that the petition for rehearing be considered by the Court of Appeals *en banc*. The reasons in support of this suggestion are likewise set forth hereinafter.

I

THE SCOPE OF APPELLATE REVIEW IN DISBARMENT PROCEEDINGS.

This Court's decision in this proceeding has left in confusion the law of this Circuit with respect to the scope of

appellate review of disbarment proceedings in the district courts. In essence, the Court's decision is based on its conclusion that: "Even if a less severe measure of discipline might have been imposed, we do not find any abuse of discretion in disbarring the Respondent from practice . . .". The opinion also characterizes Judge Hincks' determination below as "a carefully considered opinion". Accordingly, it appears to have been held in this case that, even if the Court of Appeals in an original proceeding would have imposed "a less severe measure of discipline", it will not set aside or mitigate the penalty imposed by the District Court, unless that penalty appears to have been based upon "abuse of discretion" by the District Judge.

Now, it is true that this Court has used the phrase "abuse of discretion" on earlier occasions, when it has reviewed the suspension orders of district courts. See *In re Chopak*, 160 F. 2d 886, 887 and *In re Schachne*, 87 F. 2d 887, as well as Circuit Judge Kenyon's opinion in *Bartos v. United States District Court*, 19 F. 2d 722, 731 (8th Cir.). However, in case of permanent disbarment (as distinguished from suspension), this Court has not hesitated to substitute its own judgment. *In re Doe*, 95 F. 2d 386.

Moreover, as was pointed out in Judge Clark's dissenting opinion, this case involves "no question of evaluating the credibility of witnesses". The question whether Mr. Sacher should be allowed to practice before the District Court for the Southern District of New York is not analogous to a factual issue of negligence or guilt, such as is traditionally left, within limits, to the final decision of juries or trial judges. On the contrary, this cause relates to the integrity of federal judicial proceedings within this Circuit.

Mr. Sacher, like most lawyers admitted to practice before the federal district courts, also practices before this

Court. It would seem not only appropriate, but highly desirable, that this Court should enunciate and apply its *own* opinion concerning Mr. Sacher's qualifications as an attorney, and that this Court should satisfy itself that the punishment to be visited upon him is neither too lenient nor too severe. Compare *In re Fisher*, 179 F. 2d 361 (7th Cir.), where, despite Chief Judge Major's characterization of District Judge Campbell's disbarment order as based on "careful consideration" (just as Judge A. N. Hand characterized Judge Hincks' opinion as "carefully considered"), the Court of Appeals for the Seventh Circuit nevertheless concluded that Judge Campbell's conclusion was "erroneous", and that the penalty he had imposed (suspension from practice for three years) was too severe.

Finally, the use which this Court has made in this proceeding of the phrase "abuse of discretion" appears to be in clear conflict with the earlier decision of this Court in *In re Doe*, 95 F. 2d 386. There the District Judge had permanently disbarred the appellant for shadowing jurors—misconduct which the Supreme Court had earlier held to constitute criminal contempt. *Sinclair v. United States*, 279 U. S. 749. In a *per curiam* opinion (Judges Learned Hand, Swan and Augustus N. Hand), this Court reversed the order of disbarment. The decision was *not* based on abuse of discretion by the District Judge; this Court's opinion simply declared (at page 387): "... it seems to us that disbarment is too severe a penalty ..." and "... we should impose a less severe punishment". It was, perhaps, a comparison of this decision on permanent disbarment with the earlier ruling on temporary suspension in *In re Schachne*, *supra*, that led Judge Clark, dissenting in *In re Chopak*, *supra*, to remark (at page 889): "How far our review should extend is not clear." But whatever question there might be in a suspension case, the *Doe* case clearly established it as the law

of this Circuit that an order permanently disbarring an attorney would, if too severe, be reversed on appeal.

It is clear, of course, that the opinion of the District Judge should be given weight by the Court of Appeals, particularly in a close case. But we submit that there is nothing to be gained, and that the issue would be confused, by efforts to distinguish between disbarment orders which are "erroneous", and those which are so erroneous as to constitute an "abuse of discretion".¹

Inasmuch as the law within this Circuit appears to be in conflict on this question, this seems clearly to constitute a case appropriate for rehearing by the full court of active judges *en banc*, in accordance with 28 U. S. C. § 46(c) and the *Western Pacific* case, *supra*.

II

LACK OF LEGAL BASIS FOR THE DISBARMENT ORDER.

So far as concerns the specific charges against Mr. Sacher on which Judge Hincks' disbarment order is based, there is little to be added to what has already been set forth in the respondent-appellant's brief, and in Judge Clark's dissenting opinion. It is desirable not to burden this petition with repetition, and to concentrate its bearing on the basic legal principles applicable to disbarment, on which the judges of this Circuit are divided, and the decisions in conflict.

The Court's opinion in this case does not mention the Supreme Court's recent decision in the contemporaneous dis-

¹See *Barnett v. Equitable Trust Co.*, 34 F. 2d 916, 920, wherein this Court, through Judge Learned Hand, wrote "... we think the allowance plainly too large. It is argued that we should not disturb it, unless there has been an abuse of discretion. Perhaps so, but that phrase means more than that we will not intervene, so long as we think that the amount is within permissible limits; if our conviction is definite that it is [not?], we cannot properly abdicate our judgment."

barment proceeding entitled *In re Isserman*, 345 U. S. 286. Nor does it mention the Supreme Court's early ruling on disbarment in *Bradley v. Fisher*, 13 Wall. 335 (1871). However, in his dissenting opinion Judge Clark expressed the view that a reversal of Mr. Sacher's disbarment order should follow *a fortiori* from the *Isserman* decision, and that *Bradley v. Fisher* should govern the present case.

The respondent-appellant respectfully submits that this Court's failure to observe the *Isserman* and *Bradley* cases has led it to affirm a disbarment order which is both unprecedented, and unwarranted under the law as declared by the Supreme Court. Very early in the judicial history of our country it was laid down by the Supreme Court that the power to punish for contempt should be governed by the exercise of "the least possible power adequate to the end proposed". *Anderson v. Dunn*, 6 Wheat. 204, 227, 231. The judicial power of disbarment is not, of course, identical in scope or purpose with the power to punish for contempt. Nevertheless, it is in many respects parallel, and in 1871 the Supreme Court carried over into its consideration of a disbarment order the same principle which had earlier been enunciated in dealing with contempts. In *Bradley v. Fisher*, *supra*, the Court was called upon to consider the case of an attorney who had physically threatened a judge who had just come down from the bench. The Court declared (13 Wall. at p. 355) that: "A removal from the Bar should, therefore, never be decreed where any punishment less severe—such as reprimand, temporary suspension or fine—would accomplish the end desired." The Court's opinion in this very case recognizes that "a less severe measure of discipline might have been imposed". If this be so, it follows from the *Anderson* and *Bradley* cases that Judge Hincks' order of per-

manent disbarment must, as a matter of law, at least be mitigated.

Furthermore, there is no other case, to our knowledge, where an attorney has been permanently disbarred on the sole ground of contempt. This factor was found governing by the four dissenting justices in the *Isserman* case. Nor was this factor disregarded by the other four participating justices, who relied in their decision not only upon the contempt of which Isserman stood convicted but also upon his earlier conviction for statutory rape. In addition, the four justices who held that Isserman had not met the burden of showing cause why he should not be disbarred, were guided in principal part by their reluctance to disregard "in the absence of some grave reason to the contrary" the disbarment order of the New Jersey Supreme Court.

For these reasons, Judge Clark declared in his dissenting opinion that the *Isserman* and *Bradley* decisions require a reversal of Mr. Sacher's disbarment order. In addition, it should be remarked that this order can hardly be squared with either the language or the holding of this Court in *In re Doe, supra*. For that case lays down as a matter of law that permanent disbarment is "fitting" only where an attorney has been guilty of "things abhorrent to honest and fair dealing". But here, Mr. Sacher has been explicitly absolved by the District Court of any "venality" or "moral turpitude" and received the District Judge's recommendation as a trustworthy representative "in commercial fields".

Here again, accordingly, this Court's decision has caused a conflict in the decisions within this Circuit. This result, together with the Court's failure to give effect to the *Isser-*

man and *Bradley* rulings by the Supreme Court, strongly suggest the desirability that this petition for rehearing be considered *en banc*.

III

THE CONSIDERATION TO BE GIVEN RESPONDENT-APPELLANT'S PRIOR PUNISHMENT FOR CONTEMPT.

As this Court's opinion rightly declares, the purpose of disbarment is not punishment of the disbarred attorney. This was laid down at least 175 years ago by Lord Mansfield in *Ex Parte Brownson*, 2 Cowper 829 (K. B. 1778), and is the basis of the many statements in the books that disbarment is not punishment. The saying is correct enough if taken to mean that disbarment is not for the *purpose* of punishment. On the other hand, it is wholly unrealistic to construct a dialectical superstructure on the premise that disbarment does not in *fact* involve and result in an extremely severe punishment. Indeed, in *Bradley v. Fisher*, *supra*, at page 355, the Court referred to disbarment as a severe "punishment," which should never be decreed where lesser measures would serve the purpose. It would be supererogatory to belabor this point further, well-known as it is to this Court that a lawyer's livelihood and repute alike depend on his license to practice his chosen profession.

With all respect, it appears to the respondent-appellant that both Judge Hincks and this Court have taken a totally unrealistic view of the practical effect of the disbarment order. Judge Hincks said in his opinion—and this Court quoted the statement with apparent approval—that Mr. Sacher's "qualities . . . might well be unobjectionable in

commercial fields" and that "... in negotiations at arm's length for some commercial advantage to a principal I should expect that he would be a trustworthy and highly effective representative." But is it really to be expected that Mr. Sacher—51 years old, 29 years at the Bar, and now the object of widespread publicity as legal representative of those whose political affiliations are abhorrent to most segments of public opinion, as the recipient of a six-month's jail sentence for contempt, and as a disbarred attorney—will be able to make the transition from the legal profession to "commercial fields"? However gratifying it may be that the judges believe his qualities are suitable for commercial application, it is hardly to be expected that many businessmen will retain one who is laboring under such a triple stigma, and whose entire career has been devoted to professional rather than commercial pursuits.

Now, it is of course true that the fact that the disbarment sentence will grievously injure, if not ruin, the respondent-appellant, is not determinative, if disbarment is really called for under the legal principles applicable to this situation. The respondent-appellant does not contend that his service of a six-month jail sentence for contempt gives him immunity to the penalty of disbarment, but it does not follow that his conviction and punishment for contempt is an irrelevant circumstance in determining whether disbarment is now called for.

In disbarment proceedings, according to Lord Mansfield, the test is "whether a man ... is a proper person to be continued on the roll or not" (*Ex Parte Brownell, supra*), and no one has since put the matter more succinctly. The Supreme Court in the *Bradley* case, *supra* at page 354, stated that the test is whether "the continuance of the attorney in

practice [is] incompatible with a proper respect for the Court itself, or a proper regard for the integrity of the profession."

Respondent-appellant's service of the contempt sentence is not a substitute for meeting these tests, but it is a factor to be weighed in determining whether the test dictates his disbarment. Yet this Court and Judge Hincks seem to have given it little or no weight and this, we respectfully submit, has led to an erroneous and oppressive result.

For surely respect for the courts, and the integrity of the legal profession, have been amply vindicated by the heavy contempt sentences meted out to Mr. Sacher and his colleagues, and the many and weighty reprimands administered to them by high and the highest judicial authority. Insofar as the deterrent effect on other lawyers may be considered, it is equally hard to believe that additional measures remain necessary.

The question resolves itself, then, to Lord Mansfield's simple test: Is Mr. Sacher "a proper person to be continued on the roll or not"? He has been explicitly cleared of "venality or lack of fidelity" and of "moral turpitude", and the charge that he plotted with others to subvert justice was not sustained by the courts that reviewed his contempt sentence. Apart from his conduct in the unusual and trying circumstances of *Dennis* case—and the seriousness of this is not to be questioned—his professional record over many years is admittedly superior; his professional activities and abilities have recently been highly praised by this very Court. *United States v. Hall*, 198 F. 2d 726, 727, 730 (2d Cir.) and 101 F. Supp. 666 (S. D. N. Y.); *U. S. ex rel Nukh v. District Director*, decided June 17, 1953 (2d Cir.). In the light of all this, should not the severe punishment which has already been imposed upon Mr. Sacher be given weight in

gauging his probable future conduct as an attorney? Is it not both logical and natural to infer that what Judge Clark called "his searing experience" is likely to leave an imprint on Mr. Sacher's professional behavior?

In summary, it appears that the principle that the purpose of disbarment is not punishment has here been mistakenly turned into the notion that punishment should be disregarded in testing the respondent-appellant's fitness for continued membership in the Bar. We respectfully suggest that this raises a fundamental issue concerning the nature of disbarment proceedings which should be resolved for the federal courts in this Circuit by this Court sitting *en banc*.

IV

SUGGESTION THAT THIS PETITION BE CONSIDERED BY THE COURT EN BANC.

It is provided in 28 U. S. C. § 46(c) that "a majority of the circuit judges of the circuit who are in active service" may order a "rehearing before the court in banc" and that "a court in banc shall consist of all active circuit judges of the circuit". In *Western Pacific Railroad Corporation v. Western Pacific Railroad Company*, 345 U. S. 247, it was held that this "statute deals not with rights but with power" and that "the manner in which that power is to be administered is left to the court itself". However, the Supreme Court went on to prescribe that the "procedure governing the exercise of the power . . . should be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with it", and that whatever procedure is adopted should make it possible for a litigant

to suggest "to those judges who, under the procedure established by the court, have the responsibility of initiating a rehearing *en banc*, that his case is an appropriate one for the exercise of the power." In pursuance of the provisions of the statute and the Supreme Court's interpretation thereof, the respondent-appellant respectfully suggests "that his case is an appropriate one for the exercise of the power."

A. Reasons in Support of the Suggestion

In setting forth above the reasons in support of this petition for rehearing, attention has been directed to those factors which make this case an appropriate one for rehearing *en banc*. With respect to the legal basis for the disbarment order, and the scope of appellate review of that order, the decision of this Court in this case has caused, or perpetuated, a conflict of decisions within the Circuit. Furthermore, the decision here is in conflict with the Supreme Court's opinion in *Bradley v. Fisher*, *supra*, and with the plain implications of its decision in *In re Isserman*, *supra*. Finally, the criteria to be applied in disbarment proceedings in the federal courts of this Circuit should, it is submitted, be authoritatively laid down by the Court of Appeals *en banc*. This is especially desirable since this proceeding is not primarily an issue between litigants, but is a matter pertaining to the integrity of judicial proceedings and the character of the Bar within this Circuit.

The Supreme Court has explicitly pointed out the usefulness of *en banc* sittings where a "conflict of views" has arisen among the judges of a circuit. *United States ex rel Robinson v. Johnston*, 316 U. S. 649, and *Civil Aeronautics Board v. American Air Transport Inc.*, 344 U. S. 4, both cited with approval in the *Western Pacific* case, *supra*, at

footnote 20. Likewise, the Honorable Albert B. Maria, Circuit Judge for the Third Circuit and Chairman of the Judicial Conference Committee on the Revision of Laws, has recently called attention to the value of *en banc* hearings in order to maintain the integrity of the Court of Appeals as an institution, and to insure that the views of a majority of all its active judges govern its decisions. *Hearing and Rehearing Cases In Banc*, 14 F. R. D. 91, 96.

Quite apart from the provisions of 28 U. S. C. § 46(c), courts have found it desirable, where the principles governing disbarment were at issue, to resolve them by decision *en banc*. Thus, the federal district judges in the Eastern District of New York have twice passed upon disbarment matters *en banc*, though without the participation of the judge or judges who had been previously the object of the attorney's misconduct. See *In re Chopak*, 66 F. Supp. 265; *In re Schachne*, 5 F. Supp. 680. In *Ex Parte Brounsall*, *supra*, after Lord Mansfield had been apprised of the nature of the attorney's misconduct, he observed (at p. 830): "But as it is for the dignity of the profession that a solemn opinion should be given, we will take an opportunity of mentioning it to all the judges." And then at a later date he announced the unanimous opinion of "all the judges", laying down the legal test described above.

For all these reasons, it is respectfully urged that the suggestion that this petition be passed upon *en banc* is well founded.

B. To Whom the Suggestion of an *En Banc* Hearing Should Be Addressed

As stated above, the *Western Pacific* case states that a litigant should address his suggestion for *en banc* hearing

"to those judges who, under the procedure established by the court, have the responsibility of initiating a rehearing *en banc* . . .". Upon inquiry, the Clerk of this Court was unable to advise counsel for respondent-appellant which judges of this Court have this responsibility; likewise, the Clerk was unaware of any procedure established by this Court for the carrying out of 28 U. S. C. § 46(c), in line with the requirement laid down in the *Western Pacific* case.

There are, no doubt, a variety of procedures by which a Court of Appeals may determine to carry into effect the provisions of 28 U. S. C. § 46(c). In the *Western Pacific* case, the Supreme Court pointed to two such methods. The first, and the method which would seem to be the normal one under the statute in the absence of express provision for some other procedure, is that: ". . . the court may, as has been shown, adopt a practice whereby a majority of the full bench may determine whether there will be hearings or rehearings *en banc* . . .". Or, says the Supreme Court, the Court of Appeals "may delegate the responsibility for the initiation of the *en banc* power to the divisions of the court."

In the preparation of this petition and suggestion, time has not permitted a canvass of all the other Courts of Appeals to ascertain whether or not procedures governing this problem have been promulgated and, if so, the nature of such procedures. However, information is at hand concerning the procedures adopted and announced by the Courts of Appeals for the Third and Ninth Circuits. The procedure in the Third Circuit is described in Judge Maris' article, *Hearing and Rehearing Cases in Banc*, 14 F. R. D. 91, already referred to. From this article, it appears that, in the Third Circuit, every case is submitted to the active

Judges to determine whether or not there should be a hearing *en banc*. This is done by circulating to all the judges the draft of the opinion in each case, in order to give the non-participating judges the opportunity to declare their desire for a hearing *en banc*.

Likewise, under the practice of the Third Circuit, every petition for rehearing is circulated to all of the active judges. The judges constituting the panel that heard the case vote to grant or deny the petition; the non-participating judges inform the Clerk whether they wish to hold a hearing *en banc*, to deny the litigant's request for a hearing *en banc*, or to leave it to the panel of judges who heard the case to act on the petition. Accordingly, as Judge Maris states (at page 94):

"Any judge who was not on the original hearing panel, may, however, give full consideration to the merits of the petition for rehearing and vote upon it if it appears to him to be a case that may be appropriate for a rehearing in banc."

In every case, whether on hearing or rehearing, if a majority of the active judges (four in the Third Circuit) vote for an *en banc* argument, such argument is had. And the foregoing procedure, according to Judge Maris, has worked to the satisfaction of all the judges of the Third Circuit.

The *Western Pacific* case went to the Supreme Court on certiorari from the Court of Appeals for the Ninth Circuit. Following the Supreme Court's decision, on May 27, 1953 the Court of Appeals amended its Rule 23 by adding thereto two new paragraphs. These provisions are set forth in the *per curiam* opinion of the Court of Appeals in the *Western Pacific* case filed June 12, 1953, but not yet reported. They read as follows:

"All petitions for rehearing shall be addressed to and be determined by the court as constituted in the original hearing.

"Should a majority of the court as so constituted grant a rehearing and either from a suggestion by a party or upon its own motion be of the opinion that the case should be reheard *en banc*, they shall so notify the Chief Judge. The Chief Judge shall thereupon convene the active judges of the court, and the court shall thereupon determine whether the case shall be reheard *en banc*."

Under this provision, the division of the court which originally heard a case determines whether or not to initiate a rehearing *en banc*. All of the circuit judges of the Ninth Circuit appear to have concurred in the issuance of this amended rule, but Judge Pope dissented from its application in the *Western Pacific* case itself, and expressed the view that that case should be held by and reheard before the entire court *en banc*, and not referred back to the division. In a concurring opinion, Chief Judge Denman, in substance, encouraged the division which heard the *Western Pacific* case to initiate a rehearing *en banc*.

Certainly it is quite outside the province of this petition to advise this Court concerning the procedure to be adopted in execution of 28 U. S. C. § 46(c). However, in the absence of action by this Court which would "delegate the responsibility for the initiation of the *en banc* power to the divisions of the court" (as the Supreme Court put it in the *Western Pacific* case), it would appear that such responsibility continues to reside in "the majority of the full bench" of active judges. Accordingly, this suggestion that the petition for rehearing in this case be heard *en banc* is so addressed.

CONCLUSION

Wherefore, the respondent-appellant prays this Court to grant this petition for rehearing, and suggests that this petition be heard before the Court *en banc*.

Dated: August 6, 1953.

Respectfully submitted,

TELFORD TAYLOR
Counsel for Respondent-Appellant
400 Madison Avenue
New York 17, N. Y.

CERTIFICATE OF COUNSEL

I, TELFORD TAYLOR, do hereby certify that I am acting herein as counsel for the respondent-appellant and that this Petition and Suggestion for rehearing *en banc* is presented in good faith and not for delay.

Dated Aug. 6, 1953

.....
Telford Taylor

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 183—October Term, 1952

(Petition submitted August 7, 1953

Decided August 20, 1953.)

Docket No. 22302

In the Matter

—of—

HAROLD SACHER, also known as "Harry" Sacher,
and ABRAHAM J. ISSERMAN,

Attorneys,

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK and
NEW YORK COUNTY LAWYERS' ASSOCIATION,

Petitioners-Appellees,

—and—

HAROLD SACHER, also known as "Harry" Sacher,
an Attorney,

Respondent-Appellant.

Before:

AUGUSTUS N. HAND, CHASE and CLARK,

Circuit Judges.

TELFORD TAYLOR, Counsel for Respondent-Appel-
lant.

PER CURIAM:

Petition for rehearing is denied.

CLARK, *Circuit Judge* (dissenting).

While I desire to record my view that appellant's points of law in criticism of the opinion of this court heretofore entered in this case are well taken and that the petition ought to be heard *en banc*, yet I shall not ask for a separate vote of all the judges on this petition. I do think we are not complying with the requirements for *en banc* hearings stated in *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U. S. 247; but the point is sufficiently made on the record for purposes of review, and a vote by only the three judges now active and available to participate would doubtless be no more convincing than decision by a minority of the court. The interest of expeditious review suggests that no further delay be had in this court. Judge Frank authorizes me to say that he concurs in my views that the issue ought to be heard *en banc*, but that no further steps should be taken here in view of the state of the record and we can properly await and hope for instructions by the Supreme Court as to the procedure we ought to follow.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals,
in and for the Second Circuit, held at the United States Court
House, in the City of New York, on the 20th day of August,
one thousand nine hundred and fifty-three.

Present:

HON. AUGUSTUS N. HAND
HON. HARRIE B. CHASE
Circuit Judges.

In the Matter

of

HAROLD J. SACHER, etc. & ABRAHAM J.
ISSERMAN,

Attorneys,

ASSOCIATION OF THE BAR OF THE CITY OF
NEW YORK, *et al.,*

Petitioners-Appellees

HAROLD SACHER, etc.

Respondent-Appellant

A petition for a rehearing having been filed herein by
counsel for the appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

ALEXANDER M. BELL

Clerk

By

A. DANIEL FUSARO
Deputy Clerk

**UNITED STATES COURT
OF APPEALS
SECOND CIRCUIT**

In re

HAROLD SACHS

ORDER

**UNITED STATES COURT
OF APPEALS
SECOND CIRCUIT**

FILED AUG 20 1953

ALEXANDER M BELL CLERK

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK

I, ALEXANDER M. BELL, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 324, inclusive, contain a true and complete transcript of printed portions of the record and proceedings had in said Court, in the case entitled

In the Matter of

Harold Sacher, etc. & Abraham
J. Isserman,

Attorneys,

Association of the Bar of the City of
New York and Ano.,

Petitioners-Appellees,

Harold Sacher, etc.,

Respondent-Appellant,

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 26th day of August in the year of our Lord one thousand nine hundred and fifty-three, and of the Independence of the said United States the one hundred and seventy-eighth.

ALEXANDER M. BELL

Clerk:

by A. DANIEL FUSARO

Deputy Clerk

[SEAL]

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U. S.

FILED

SEP 1 1953

HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States
October Term, 1953

No. 307...

In the Matter
of

HAROLD SACHER, also known as "Harry" Sacher,
and ABRAHAM J. ISSERMAN,
Attorneys.

HAROLD SACHER, also known as "Harry" Sacher,
an Attorney,
Petitioner,
and

ASSOCIATION OF THE BAR OF THE CITY
OF NEW YORK and NEW YORK COUNTY
LAWYERS' ASSOCIATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

TELFORD TAYLOR
New York, N. Y.
Counsel for Petitioner

INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Specification of errors to be urged	6
Reasons for granting the writ	7
Conclusion	22
Appendix	23

CITATIONS

Cases:

<i>Anderson v. Dunn</i> , 6 Wheat. 204	8
<i>Barnett v. Equitable Trust Co.</i> , 34 F. 2d 916, 920 (2d Cir.)	14, 17
<i>Bartbs v. United States District Court</i> , 19 F. 2d 722 (8th Cir.)	14, 17
<i>Bradley v. Fisher</i> , 13 Wall. 335 (1871)	8, 9, 12
<i>Campbell v. Third District Committee</i> , 179 Va. 244, 18 S. E. 2d 883	18
<i>Cobb v. United States</i> , 172 Fed. 641 (9th Cir. 1909) ..	12
<i>Conley v. United States</i> , 59 F. 2d 929 (8th Cir.) ..	15, 16
<i>Costigan v. Adkins</i> , 18 F. 2d 803 (D. C. Cir.) certi- orari denied 274 U. S. 760	8, 13, 14, 16
<i>Curtis v. Whiteford</i> , 41 F. 2d 302 (D. C. Cir.)	15

<i>Duke v. Committee on Grievances</i> , 82 F. 2d 890 (D. C. Cir.) cert. denied 298 U. S. 662	8, 16
<i>Ex parte Bradley</i> , 7 Wall. (U. S.) 364	15
<i>Ex parte Brounsall</i> , 2 Cowper 829 (K. B. 1778) ..	8, 9, 20
<i>Ex parte Burr</i> , 9 Wheat. 529 (U. S. 1824)	15
<i>Ex parte Garland</i> , 4 Wall. (U. S.) 333	3
<i>Ex parte Park & Tilford</i> , 245 U. S. 82	15
<i>Ex parte Robinson</i> , 19 Wall. (U. S.) 505	15
<i>Ex parte Secombe</i> , 19 How. (U. S.) 9	15
<i>Ex parte Wall</i> , 107 U. S. 265, 288	8, 15
<i>Halpern v. Committee on Admissions</i> , 139 F. 2d 361 (D. C. Cir.)	15
<i>Hancock v. Andrews</i> , 161 F. 2d 547 (5th Cir.) ...	15, 16
<i>Hertz v. United States</i> , 18 F. 2d 52 (8th Cir.)	15
<i>Hurst v. Bar Rules Committee</i> , 202 Ark. 1101, 155 S. W. 2d 697	13
<i>In re Ades</i> , 6 F. Supp. 467 (D. C. Md. 1934)	13
<i>In re Adriaans</i> , 28 App. D. C. 515	16
<i>In re Claiborne</i> , 119 F. 2d 647 (1st Cir.)	15
<i>In re Chopak</i> , 160 F. 2d 886, cert. denied 331 U. S. 835	15, 16, 20
<i>In re Conner</i> , 357 Mo. 270, 207 S. W. 2d 492	18
<i>In re Doe</i> , 95 F. 2d 386 (2d Cir.)	8, 9, 17
<i>In re Emmons</i> , 316 Mich. 674, 26 N. W. 2d 560	18
<i>In re Fisher</i> , 179 F. 2d 361 (7th Cir.) cert. denied, <i>Kerner v. Fisher</i> , 340 U. S. 825	14
<i>In re Hastings</i> , Fed. Cas. No. 6199 (C. C. Cal. 1869) ..	12
<i>In re Isserman</i> , 345 U. S. 286	7, 13
<i>In re May</i> , 249 S. W. 2d 798 (Ky. 1952)	13
<i>In re Mildrum</i> , 243 Iowa 777, 51 N. W. 2d 881	18
<i>In re Noell</i> , 93 F. 2d 5	20
<i>In re Patterson</i> , 176 F. 2d 966 (9th Cir. 1949) ..	8, 13, 14
<i>In re Schachne</i> , 18 F. 2d 887	16, 20
<i>In re Scott</i> , 53 Nev. 24, 292 Pac. 291	18

<i>In re Spicer</i> , 125 F. 2d 288 (6th Cir.)	15
<i>In re Thomas</i> , 36 Fed. 242 (C. C. D. Colo. 1888) ..	14
<i>In re Watt & Dohan</i> , 149 Fed. 1009 (C. C. E. D. Pa.)	8, 13
<i>Kingsland v. Dorsey</i> , 173 F. 2d 405 (D. C. Cir.), reversed on other grounds, 338 U. S. 318	14, 16
<i>Matter of Flourney</i> , 142 Fla. 459, 195 So. 138	18
<i>Matter of Robinson</i> , 140 App. Div. (N. Y.) 329...	8, 13
<i>Memphis & Shelby County Bar Association v. Aspero</i> 35 Tenn. App. 9, 242 S. W. 2d 319	18
<i>Matter of Rouss</i> , 221 N. Y. 81	8
<i>Randall v. Brigham</i> , 7 Wall. (U. S.) 523	3
<i>Sacher v. United States</i> , 343 U. S. 1	4, 10
<i>Selling v. Radford</i> , 243 U. S. 46	7
<i>Smith's Appeal</i> , 179 Pa. 14, 36 Atl. 134	8, 13
<i>State Board of Examiners v. Brown</i> , 42 Wyo. 108, 290 Pac. 1013	18
<i>Thatcher v. United States</i> , 241 U. S. 644	15
<i>The Life & Insurance Co. of New York v. Adams</i> , 9 Pet. (U. S.) 573	15
<i>Thomas v. Ogilby</i> , 44 F. 2d 890 (D. C. Cir.)	15
<i>Tulman v. Committee on Admissions</i> , 135 F. 2d 268 (D. C. Cir.)	15, 16
<i>United States v. Costen</i> , 38 Fed. 24 (C. C. D. Colo).	8
<i>United States v. Dennis, et al</i> , 183 F. 2d (2d Cir.) affirmed 341 U. S. 494	2, 4, 7, 10
<i>United States ex rel Nukk v. District Director</i> , decided June 17, 1953 (2d Cir.)	11
<i>United States v. Hall</i> , 198 F. 2d 726 (2d Cir.)	11, 13
<i>United States v. Hicks</i> , 37 F. 2d 289 (9th Cir.)	8, 14
<i>United States v. Sacher</i> , 182 F. 2d 416 (2d Cir.) ..	10
<i>Western Pacific Railroad Corporation v. Western Pacific Railroad Company</i> , 345 U. S. 247	3, 6, 18, 19, 20, 21

STATUTES AND MISCELLANEOUS

	PAGE
28 U. S. C. 1254(1)	2
28 U. S. C. 46	3, 18
<i>Hearing and Rehearing Cases In Banc</i> , 44 F. R. D. 91, 96	21
Rule 2 par. 5 of the Rules of the United States Supreme Court	7
Rule 31 of the Rules of the United States Court of Appeals	5
Rule 7(3) of the Rules of the United States Court of Appeals, First Circuit	13
Rule 7(2) of the Rules of the United States Court of Appeals, Sixth Circuit	14
Rule 7(3) of the Rules of the United States Court of Appeals, Tenth Circuit	13
Rule 6(b) of the Rules of the United States Court of Appeals, Seventh Circuit	13
Rule 7(3) of the Rules of the United States Court of Appeals, Fifth Circuit	13
Rule 6(3) of the Rules of the United States Court of Appeals, Fourth Circuit	13
Rule 8(3) of the Rules of the United States Court of Appeals, Third Circuit	13
Rule 6(d) of the Rules of the United States Court of Appeals, Eighth Circuit	14
Rule 5(b) of the Rules of the United States District Court for the Southern District of New York	3

In the
Supreme Court of the United States
October Term, 1953

In the Matter

of

HAROLD SACHER, also known as "Harry"
Sacher, and ABRAHAM J. ISSERMAN,
Attorneys.

HAROLD SACHER, also known as "Harry"
Sacher, an Attorney,
Petitioner,
and

ASSOCIATION OF THE BAR OF THE CITY
OF NEW YORK and NEW YORK COUNTY
LAWYERS' ASSOCIATION,
Respondents.

No.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

Petitioner, Harry Sacher, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on July 6, 1953.

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York, and the opinions of the Court of

Appeals for the Second Circuit affirming the judgment below, and denying the petition for rehearing, have not yet been officially reported; they are printed at Tr. 237-71, 276-91, and 321-22, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 1953. The order of the Court of Appeals denying the petition for rehearing was entered on August 20, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

The Court of Appeals for the Second Circuit affirmed an order of the District Court for the Southern District of New York disbarring petitioner from the bar of the District Court for professional misconduct in the course of his professional representation of defendants in connection with the trial of *United States v. Dennis, et al*, 183 F. 2d 201 (2d Cir.), affirmed 341 U. S. 494. The opinion of the court, by Judge Augustus N. Hand, was concurred in by Judge Chase; Judge Clark dissented. The questions are:

(1) Whether the conduct of the petitioner constitutes a basis for permanent disbarment from the bar of the United States District Court.

(2) Whether the Court of Appeals correctly held that the scope of its appellate review of the District Court's order permanently disbarring petitioner was so restricted as to preclude reversal, even though "a less severe measure of discipline might have been imposed".

(3) Whether the Court of Appeals erred in disregarding and failing to act upon petitioner's suggestion of a rehearing *en banc*, and in failing to establish any procedure for the initiation of such a rehearing, pursuant to the decision of this Court in *Western Pacific Railroad Case*, 345 U. S. 247.

STATUTES INVOLVED

The order of the District Court disbarring the petitioner is not based upon a statute; the federal courts have inherent judicial power to grant and revoke license to practice before them. *Ex Parte Garland*, 4 Wall. (U. S.), 333; *Randall v. Brigham*, 7 Wall. (U. S.) 523. The relevant provisions of Rule 5(b) of the Rules of the United States District Court for the Southern District of New York, governing disbarment, and of 28 U. S. C. 46, with respect to *en banc* hearings in the courts of appeals, are set forth in the Appendix, *infra*, pp. 23-24.

STATEMENT

This proceeding was commenced on January 17, 1950 by a petition and supporting affidavit in behalf of the bar associations (respondents in this Court), addressed to the Chief Judge of the United States District Court for the Southern District of New York (Tr. 3-56). The affidavit recited that Mr. Sacher had acted as counsel for several defendants in the trial of Dennis and others on charges of conspiracy to advocate the violent overthrow of the United States government, in the course of which Mr. Sacher and other defense attorneys had "joined in a wilful, deliberate and concerted effort to delay and obstruct the trial and proceedings" (Tr. 7-8). The affidavit listed specific instances

of Mr. Sacher's conduct, based on references to the record of the trial (Tr. 8-42). These included the episodes which had led to Mr. Sacher's being held in contempt of court in that proceeding, and with which this Court is familiar. *Sacher v. United States*, 343 U. S. 1.

After answer the matter came, on an order to show cause why petitioner should not be disbarred (Tr. 2-3), before District Judge Hincks.¹ The only evidence introduced was the record of the trial and preliminary proceedings in the *Dennis* case (Tr. 98, 277).² Judge Hincks stated on the record, and the parties agreed, that the factual issues were "of very small compass", and that what was left open for determination were "the inferences that should be drawn from the underlying allegations of fact" and the "conclusions of law" (Tr. 80).

Argument was held, briefs filed, and in January, 1952 Judge Hincks filed his opinion (Tr. 237-271) and order (Tr. 274) disbaring Mr. Sacher. Judge Hincks held that the charge of improper concert of action or "conspiracy", between Mr. Sacher and the other defense counsel in the *Dennis* case, had not been sustained (Tr. 262-266). However, the instances of individual misconduct on Mr. Sacher's part were held to require his disbarment, despite Judge Hincks' express finding (Tr. 270-271) that the record contained no intimation of "moral turpitude" or "venality or lack of fidelity to the interests of his clients" on Mr. Sacher's part, and that his determinative fault was "a temperament which led to such excess of zeal in repre-

¹Judge Hincks, of the District of Connecticut, was sitting as "designating visiting judge" in the Southern District of New York (Tr. 285).

²The record of the *Dennis* case is, by stipulation, a part of the record in the present case in this Court. Appendix, *infra*, pp. 25-26.

menting his clients that it obscured his recognition of responsibility as an officer of the court".

On appeal, the order of disbarment was affirmed by a division of the Court of Appeals for the Second Circuit, Judge Clark dissenting (Tr. 276-91). On July 20, 1953, three other judges of the Court of Appeals granted a motion to stay issuance of the mandate until August 19, 1953, pending the filing in this Court of a petition for certiorari³ (Tr. 295).

On August 6, 1953, counsel for the petitioner filed a petition and suggestion for rehearing *en banc*⁴ before the Court of Appeals (Tr. 300-320). On August 11, 1953, he filed a motion to extend the stay of the mandate until thirty days after action on the petition (Tr. 294-96). On August 14, 1953 the motion to extend the stay of the mandate was denied by the division of the Court of Appeals which had affirmed the disbarment order; Judge Clark dissented on the ground that the denial was "unnecessarily harsh and punitive action" (Tr. 297-99). On August 18, 1953, on application by counsel for the petitioner and without objection by the respondents, Justice Jackson ordered that the mandate be stayed to and including September 2, 1953, the stay to be continued should a petition for certiorari be filed on or before that date (Appendix, *infra* p. 27).

³This was in accordance with Rule 31 of the Rules of the United States Court of Appeals for the Second Circuit, which allows a thirty-day stay of the mandate, to be extended until final disposition of the case by the Supreme Court if the petition for certiorari be filed within the thirty-day period.

⁴The petition for rehearing was accompanied by a motion for extension of time in which to file the petition (Tr. 295). Counsel for the petitioner had been retained on July 31, 1953 (Tr. 295); up to that date petitioner had appeared *pro se* throughout the proceedings in both the District Court and the Court of Appeals (Tr. 94, 277).

On August 20, 1953 the same division of the Court of Appeals denied the petition for rehearing, making no reference to the suggestion that it be considered *en banc* (Tr. 321-24). Judge Clark dissented, and stated in his opinion that Judge Frank (not a member of the division which affirmed the disbarment order) "authorizes me to say that he concurs in my views that the issue ought to be heard *en banc*, but that no further steps should be taken here in view of the state of the record and we can properly await and hope for instructions by the Supreme Court as to the procedure we ought to follow."

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that petitioner's conduct constitutes a basis for permanent disbarment from the bar of the United States District Court.
2. In holding that the scope of its appellate review of the order permanently disbarring petitioner was so restricted as to preclude reversal, even though "a less severe measure of discipline might have been imposed".
3. In affirming the order of the District Court.
4. In disregarding and failing to act upon petitioner's suggestion of a rehearing *en banc*, and in failing to establish any procedure for the initiation of such a rehearing, pursuant to the decision of this Court in *Western Pacific Railroad Case*, 345 U. S. 247.
5. In denying the petition for rehearing.

REASONS FOR GRANTING THE WRIT

1. *Lack of Sufficient Basis for Permanent Disbarment.*
 It is undisputed that (a) there is no intimation of "moral turpitude" or "venality or lack of fidelity to . . . his clients" against Mr. Sacher, (b) the order of disbarment is based on a series of altercations with the trial judge in the *Dennis* case which, however reprehensible, occurred in the course of a single and singularly tense and protracted trial, (c) Mr. Sacher has already been punished for his conduct by the imposition of a six-months' jail sentence for contempt of court, (d) Mr. Sacher's previous record as an attorney over the course of many years is, as the court below described it, "unblemished" (Tr. 280), and (e) subsequent to the *Dennis* trial, Mr. Sacher has so demeaned himself as twice to win public commendation from the court below (Tr. 283).

In these circumstances, we submit, the record is utterly insufficient to warrant an order of permanent disbarment, and the consequent total destruction of Mr. Sacher's professional status and means of livelihood. There is, to our knowledge, no precedent for so severe a judgment in comparable situations,⁴ and the decision below is in conflict

⁴*In re Isserman*, 345 U. S. 286, decided by an evenly divided Court, is not comparable, as that decision relied in part on Isserman's earlier conviction of statutory rape, and his failure to disclose the conviction when seeking membership in the bar of this Court. Furthermore, Isserman had been disbarred by the Supreme Court of the State of New Jersey, which absent "some grave reason to the contrary" governed the decision by this Court. *Selling v. Radford*, 243 U. S. 46; see also Rule 2 par. 5 of the Rules of this Court. Accordingly, the upshot of the *Isserman* case was determined, in view of this Court's even division, by the shifted burden of proof. Mr. Sacher, a member of the bar in New York State, has not been disbarred by the courts of that State (Tr. 282).

with the decisions of this Court and of other federal courts. *Bradley v. Fisher*, 13 Wall. (U. S.) 335, 355; *In re Doe*, 95 F. 2d 386 (2d Cir.); *In re Patterson*, 176 F. 2d 966 (9th Cir.); *Conigan v. Adkins*, 18 F. 2d 803 (D. C. Cir.), certiorari denied 274 U. S. 780; *United States v. Hicks*, 37 F. 2d 289 (9th Cir.); *United States v. Costen*, 38 Fed. 24 (C. C. D. Colo.); *In re Watt & Dohan*, 149 Fed. 1009 (C. C. E. D. Pa.); see also *Smith's Appeal*, 179 Pa. 14 36 Ad. 134; *Matter of Robinson*, 140 App. Div. (N. Y.) 329.

The general principles governing disbarment proceedings are well settled. Disbarment is not for the purpose of punishment. *Ex parte Wall*, 107 U. S. 265, 288; *Duke v. Committee*, 82 F. 2d 890 (D. C. Cir.); *Matter of Rouss*, 221 N. Y. 81; *Ex parte Brounsall*, 2 Cowper 829 (K. B. 1778). But the courts recognize that disbarment is in fact a very severe punishment. *Bradley v. Fisher*, 13 Wall. (U. S.) 335, 355; *In re Doe*, 95 F. 2d 386, 387 (2d Cir.); *In re Watt & Dohan*, *supra*; *Smith's Appeal*, *supra*. Therefore, this Court many years ago laid it down as a matter of law in *Bradley v. Fisher*, *supra*, at p. 355, that:

"A removal from the bar should therefore never be decreed where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired."

The decision below is squarely in conflict with this principle. The majority opinion affirming the order of permanent disbarment expressly recognizes that "a less

"The rule of the *Bradley* case was logically derived from the principle earlier declared in contempt cases that punishment should be governed by the exercise of "the least possible power adequate to the end proposed." *Anderson v. Dunn*, 6 Wheat. (U. S.) 204, 231.

severe measure of discipline might have been imposed" (Tr. 281). This case does not present the question whether a period of suspension from the bar is too long, which might be described as a question of degree, judgment, or discretion. Permanent disbarment has been ordered, and if a lesser punishment "might have been imposed", the order is erroneous under the *Bradley* case and must be reversed.

Quite apart from this admission, fatal to its validity, in the majority opinion, it is clear that the order of permanent disbarment is unwarranted. In disbarment proceedings, according to Lord Mansfield, the test is "whether a man . . . is a proper person to be continued on the roll or not" (*Ex parte Brounsall, supra*), and no one has since put the matter more succinctly. This Court in the *Bradley* case, *supra* at page 354, described the test as whether "the continuance of the attorney in practice [is] incompatible with a proper respect for the Court itself, or a proper regard for the integrity of the profession." In other words, the purposes of disbarment proceedings are to protect the courts, and to preserve the standards of the legal profession.

In applying these principles, the courts generally have ordered permanent disbarment only in cases where immoral or corrupt conduct was involved. Thus in *In re Doe*, 95 F. 2d 386, at 387 the Court of Appeals for the Second Circuit in a *per curiam* opinion (Judges Learned Hand, Swan and Augustus N. Hand) laid down the rule that:

"That this acknowledgment that a lesser penalty might have met the disciplinary requirements, was not merely hypothetical and for the purposes of argument, is apparent from the fact that elsewhere the majority opinion recognized that Judge Hinds had treated too seriously a figure of speech used on argument by the petitioner (Tr. 279), and by the statement in Judge Clark's dissent (Tr. 284) that the "harshness" of the order of permanent disbarment "apparently does trouble my brothers, judging from the sense of apology with which the sentence is affirmed."

"Disbarment is fitting only when the attorney has been guilty of corrupt conduct; of some attempt to suborn a witness, or to bribe a juror, or to forge a document, or to embezzle clients' property, or other things abhorrent to honest and fair dealing."

Now, it can not be disputed that the record here discloses nothing of this kind.⁹ The charge that Mr. Sacher conspired with others to subvert justice was not sustained, and Judge Hincks expressly found that there was no intimation of immoral or corrupt conduct (Tr. 270). Apart from his misconduct in the unusual and trying circumstances of the *Dennis* case—and the seriousness of this is not to be questioned—his professional record over many years is admit-

The only matter relied on by Judge Hincks and the court below which might conceivably be regarded as "dishonest" is the occurrence charged in paragraph 15-XX of the bar associations' affidavit (Tr. 34), involving an alleged failure to disclose facts to the trial judge in the *Dennis* case. But this same charge had been included in Judge Medina's contempt certificate (Specification XVIII), and had been rejected as unproven by the court below in the earlier contempt proceeding. *United States v. Sacher*, 182 F. 2d 416, 424-25; see also *Sacher v. United States*, 343 U. S. 1, 27. Nevertheless, Judge Hincks and the court below treated the charge as established in the disbarment proceeding (Tr. 241-42, 278-79), despite recognition that the burden of proof was on the bar associations (Tr. 278), because Mr. Sacher did not testify in the disbarment proceeding. This seems an extraordinary ruling, inasmuch as the trial judge and both parties recognized that the record in the *Dennis* case established the facts, and what was left open was largely "a matter of argument" (Tr. 80). Counsel for the bar associations did not advert to this charge on argument before Judge Hincks (Tr. 80-141, 227-33), presumably because the Court of Appeals had already rejected it (the affidavit embodying the charge was prepared and filed prior to the Court of Appeals' decision in the contempt case). In his dissenting opinion below, Judge Clark commented on this matter, and the lower court's reliance on it, as follows (Tr. 289): "To say then that such of the contempt charges as have been eliminated by careful and formal appellate adjudication must again be separately denied so as not to avail the petitioners here is to employ the most regressive and questionable form of procedural technicality to destroy a man's livelihood."

fully superior; his professional conduct, subsequent to the Dennis case has twice been highly praised by the court below. *United States v. Hall*, 198 F. 2d 726, 727, 730; *United States ex rel. Nubb v. District Director* (2d Cir., June 17, 1953).⁹

Such a record would afford no basis for concluding that Mr. Sacher is incorrigibly contumacious, so that he must forever be excluded from the courts.¹⁰ Furthermore, in gauging Mr. Sacher's probable future conduct as an attorney, the severe punishment which has already been imposed upon him should be given weight. The petitioner does not contend that his service of a six-months' jail sentence for contempt gives him immunity to the penalty of disbarment, but his conviction and punishment for contempt is, nevertheless, a relevant circumstance in determining whether disbarment is now called for.¹¹ Yet neither the court below nor Judge

⁹Judge Clark's dissenting opinion also points out (Tr. 283) that Mr. Sacher's professional conduct was also commended on the record by District Judge Ryan during the trial of the *Hall* case. The record reference is to No. 230, 1951 Term of the Court of Appeals for the Second Circuit, pages 185, 187. Judge Ryan stated that he regarded Mr. Sacher—"as a very able lawyer who has prepared himself thoroughly on this matter, and find your position taken here to be very lawyerlike."

¹⁰Judge Hinck's opinion seems to rest by implication on such a conclusion (Tr. 254, 270), but the majority opinion of the Court of Appeals does not embody or depend upon such a conclusion.

¹¹Both Judge Hinck and the court below appear to have taken a totally unrealistic view of the practical effect of the disbarment order. Judge Hinck said in his opinion—and the court below quoted the statement with apparent approval—that Mr. Sacher's "qualities . . . might well be unobjectionable in commercial fields" and that . . . in negotiations at arm's length for some commercial advantage to a principal I should expect that he would be a trustworthy and highly effective representative" (Tr. 270, 278). But is it really to be expected that Mr. Sacher—51 years old, 29 years at the Bar, and now the object of widespread publicity as legal representative of those whose political affiliations are abhorrent to most segments of public opinion, as the recipient of a six-months' jail sentence for contempt, and as a disbarred attorney—will be able to make the transition from the legal profession to "commercial fields"? However

Hicks gave it any weight whatever; they mistakenly turned the principle, that the purpose of disbarment is not punishment, into the notion that previous punishment should be totally disregarded in testing the petitioner's fitness for continued membership in the bar. This, we respectfully submit, has led to an erroneous and oppressive result.

For surely respect for the courts, and the integrity of the legal profession (the two purposes of disciplinary action described as primary in the *Bradley* case, *supra*), have been amply vindicated by the heavy contempt sentences meted out to Mr. Sacher and his colleagues, and the many and weighty reprimands administered to them by high judicial authority. Insofar as the deterrent effect on other lawyers may be considered, it is equally hard to believe that additional measures remain necessary. And finally, it is both logical and natural to infer that what Judge Clark called "his searing experience" (Tr. 284) is likely to leave a beneficial imprint on Mr. Sacher's professional behavior, which the judicial commendations of his conduct since the *Dennis* trial seem already to reflect.

Current standards of lawful conduct are, we prayerfully venture, higher than those of seventeenth century England; nevertheless, the punishments today deemed appropriate for transgressions are, in general, far less draconic. And we do not suggest that the standards of conduct for attorneys are or should be less stringent today than formerly—quite the contrary—in observing that the decision below appears to be an atavist of old cases such as *In re Hastings*, Fed. Cas. No. 6199 (C. C. Cal. 1869), wherein attorneys were disbarred for conduct of a type

gratifying it may be that the judges believe his qualities are suitable for commercial application, it is hardly to be expected that many businessmen will retain one who is laboring under such a triple stigma, and whose entire career has been devoted to professional rather than commercial pursuits.

which is now dealt with by suspension and reprimand. Compare the *Hastings* case with *Cobb v. United States*, 172 Fed. 641 (9th Cir. 1909), *In re Ades*, 6 F. Supp. 467 (D. Md. 1934), and other decisions of the federal and state courts" embodying the principle that disbarment should not "defeat the [disciplinary] purpose by ruining him whom they would reform." See *In Re Isaacson*, 345 U. S. 286, 294. With these cases, as well as with the rule laid down by this Court in the *Bradley* case, the decision below is in plain conflict. That conflict, and the importance of the question,¹² necessitate review of this case by this Court.

¹²*In re Patterson*, 176 F. 2d 966 (9th Cir. 1949) (Assistant United States Attorney, who took private cases in questionable relation to the interests of the United States, reprimanded; order of disbarment reversed); *Costigan v. Atkins*, 18 F. 2d 803 (D. C. Cir. 1927), certiorari denied 274 U. S. 760 (Attorney concealed the loss of client's money which had been entrusted to him, but later made good the loss; conduct described as "most reprehensible", but district court's disbarment order modified to suspension for eighteen months and costs); *In re Watt & Dohan*, 149 Fed. 1009 (C. C. E. D. Pa. 1907) (Attorneys already disbarred by Circuit Court of Appeals for the Second Circuit; rule to disbar discharged, the court stating at p. : "The brief which they filed was scandalous and insulting, and richly deserved the punishment that was inflicted; but I have serious doubts whether the Circuit Court for the Eastern District of Pennsylvania, in which they have been admitted, ought to punish them again for this fault, aggravated though it was."); *Smith's Appeal*, 179 Pa. 14 (1897) (Attorney guilty of inflammatory and prejudicial conduct during a trial; lower court's order of permanent disbarment modified to two years' suspension); *Matter of Robinson*, 140 App. Div. (N. Y.) 329 (Attorney convicted in federal court of "willfully and intentionally obstructing the administration of justice" suspended for one year, taking account of his excellent past record and absence of "sordid motives", and fact that the misconduct grew out of "excessive and ill-judged zeal"); *In re May*, 249 S. W. 2d 798 (Ky. 1952) (former Congressman, convicted of felony involving moral turpitude, reinstated as member of bar).

¹³In six of the federal judicial circuits, the rules provide for disbarment of any attorney who has been disbarred "in any court of record", unless he shows good cause to the contrary. First Circuit, Rule 7(3); Third Circuit, Rule 8(3); Fourth Circuit, Rule 6(3); Fifth Circuit, Rule 7(3); Seventh Circuit, Rule 6(b); Tenth Circuit, Rule 7(3). In two other circuits, disbarment "in any court of record" automatically disbars the attorney in the circuit, without

2. *Scope of Appellate Review.* The lower court's affirmation of the order of permanent disbarment, clearly erroneous for the reasons given above, appears to have come about primarily because of its mistaken conception of the scope of its appellate review of the District Court's action. Despite the acknowledgment in the majority opinion that "a less severe measure of discipline might have been imposed" (Tr. 281), the Court of Appeals affirmed the District Court's order on the ground that (Tr. 281) "... we do not find any abuse of discretion. . .". Such a limitation on appellate review of an order of permanent disbarment is in square conflict with the decisions of the courts of appeals of other circuits and, indeed, with an earlier decision in the Second Circuit. *In re Patterson*, 176 F. 2d 966 (9th Cir.); *In re Fisher*, 179 F. 2d 361 (7th Cir.) certiorari denied *Kerner v. Fisher*, 340 U. S. 825; *Costigan v. Adkins*, 18 F. 2d 803 (D. C. Cir.), certiorari denied 274 U. S. 760; *Kingsland v. Dorsey*, 173 F. 2d 405 (D. C. Cir.), reversed on other grounds, 338 U. S. 318; *Bartos v. United States District Court*, 19 F. 2d 722 (8th Cir.); *United States v. Hicks*, 37 F. 2d 289 (9th Cir.); *In re Doe*, 95 F. 2d 386 (2d Cir.); cf. *Barnett v. Equitable Trust Co.*, 34 F. 2d 916, 920 (2d Cir.).

It is true, of course, that several other decisions have used the phrase "abuse of discretion" as descriptive of the

opportunity to show cause to the contrary. Sixth Circuit, Rule 7(2); Eighth Circuit, Rule 6(d) (the Second and Ninth Circuits have no comparable rule, and the comparable rule in this Court appears to apply only to disbarments in state, territorial, and colonial courts and the District of Columbia). Accordingly, disbarment in a federal district court has far-reaching effects on an attorney's status as such in the other federal courts. There is, therefore, great need that the principles governing disbarment proceedings be well-defined, for their uniform and equitable application within the federal judicial system. Cf. *In re Thomas*, 36 Fed. 242 (C. C. D. Colo. 1888), where a circuit and a district judge submitted a disbarment matter to the Circuit Justice (Justice Miller) for his decision.

scope of appellate review in disciplinary proceedings.¹⁴ Its use appears to derive from the circumstance that, prior to the Judiciary Act of 1925, the Supreme Court's review of disbarment proceedings in the lower courts was exercised by mandamus (rather than appeal or writ of error),¹⁵ and mandamus traditionally will issue only to correct ministerial errors or abuse of discretion.¹⁶ In modern times, some courts of appeals have declined to reverse or alter, absent abuse of discretion, a district court's disciplinary order where the issue rested on disputed questions of fact which were tried and determined below (which is not the case here);¹⁷ or

¹⁴*In re Chopak*, 160 F. 2d 886 (2d Cir.); *Certiorari* denied 331 U. S. 835; *In re Schachne*, 87 F. 2d 887 (2d Cir.); *Tulman v. Committee on Admissions*, 135 F. 2d 268 (D. C. Cir.); *In re Spicer*, 125 F. 2d 288, (6th Cir.); *In re Claiborne*, 119 F. 2d 647 (1st Cir.); *Conley v. United States*, 59 F. 2d 929 (8th Cir.); *Hancock v. Andrews*, 161 F. 2d 547 (5th Cir.).

¹⁵*Thatcher v. United States*, 241 U. S. 644; *Ex parte Robinson*, 19 Wall. (U. S.) 505, 513; *Ex parte Bradley*, 7 Wall. (U. S.) 364; but cf. *Ex parte Secombe*, 19 How. (U. S.) 9. The earliest case appears to be *Ex parte Burr*, 9 Wheat. 529 (U. S. 1824), where an application for mandamus to the Circuit Court for the District of Columbia to restore the petitioner to practice was refused, Chief Justice Marshall stating that the Court was "less inclined to interpose . . . because the complaint is not of an absolute removal, but of a suspension [for one year], which is nearly expired. . . ." In the *Thatcher* case, *supra*, the Circuit Court of Appeals for the Sixth Circuit explained (212 Fed. 801, 804-05) the Supreme Court's refusal to review disbarment by appeal or writ of error on the ground that the jurisdictional statutes required a minimum monetary amount, a requirement which did not apply to the review of district court disbarment proceedings in the circuit courts of appeals. This Court's present jurisdiction on *certiorari*, of course, is not limited by monetary requirements. 8 U. S. C. 1254(1).

¹⁶*Ex parte Park & Tilford*, 245 U. S. 82; *The Life & Fire Insurance Co. of New York v. Adams*, 9 Pet. (U. S.) 573, cf. *Ex parte Wall*, 107 U. S. 265.

¹⁷See, e.g., *Curtis v. Whiteford*, 41 F. 2d 302 (D. C. Cir.); *Thomas v. Ogilby*, 44 F. 2d 890 (D. C. Cir.); *Hulpern v. Committee on Admissions*, 139 F. 2d 361 (D. C. Cir.); *Herts v. United States*, 18 F. 2d 52 (8th Cir.); *In re Spicer*, *supra*, footnote 14.

where the court ordered suspension for a term of years, challenged as unduly severe."

But where, as is the case here, the district court orders permanent disbarment, and the undisputed facts are established by the official record of a trial, and the only question is whether the attorney's conduct is such as to require permanent disbarment, an order of affirmance cannot be rested on the "abuse of discretion" test.¹⁸ To our knowledge, an appellate court has never before affirmed such an order, as did the court below, without regard to the question whether a lesser punishment would have sufficed.

On the contrary, in cases where the courts of appeals have thought disbarment not required by the misconduct charged, they have not hesitated to reverse the district court's order, or modify it to suspension for a term of years, without reference to the rubric "abuse of discretion." For example, in a recent decision the Court of Appeals for the District of Columbia stated, with specific reference to the scope of its appellate review, that¹⁹ "there has not been a

¹⁸See e.g., *In re Chopak*, *In re Schachne*, and *Hancock v. Andrews*, all *supra*, footnote 14.

¹⁹Only the *Tulman* and *Conley* cases, *supra*, footnote 14, seem to be contrary to this statement.

²⁰*Kingsland v. Dorsy*, 173 F. 2d 405, 409. This case did not involve disbarment in the federal courts, but statutory review of an expulsion from the bar of the Patent Office. The decision was reversed by this Court on the wholly distinct ground that the statute vested primary authority in the premises in the Patent Office rather than the courts, and that there was substantial evidence to support the Patent Office's action. The statement above, quoted from the opinion of the Court of Appeals, is in line with the earlier decision of that court in *Castigan v. Adkins*, *supra*, where the lower court's order of permanent disbarment was modified on appeal (despite a finding of "most reprehensible" conduct by the attorney) to suspension for eighteen months, and with the court's early decision in *In re Adkins*, 28 App. D. C. 515. But there are other decisions in the District of Columbia which appear to rest on the "abuse of discretion" rubric. See *Duke v. Committee on Grievances*, 82 F. 2d 890, certiorari denied 298 U. S. 662, and the *Tulman* case, *supra*, footnote 14.

single case in this court where this court has failed to reexamine the entire record in a disbarment proceeding and to examine the case *de novo* to insure the fullest opportunity to the accused lawyer to protect his honor and preserve his means of livelihood." The Court of Appeals for the Second Circuit has itself reversed a district court's order of disbarment without any finding of abuse of discretion below, simply because "it seems to us that disbarment is too severe a penalty" and "we should impose a less severe punishment." *In re Doe*, 95 F. 2d 386, 387.

The root question, of course, is not whether the words "abuse of discretion" are used,²¹ but whether the appellate court will or will not reverse an order of disbarment which it believes not to be *required* by the attorney's conduct in the light of his past record and other relevant circumstances. The court below did not find that Mr. Sacher's disbarment is required, and therefore its failure to reverse the district court's order is clearly erroneous under the test laid down by this Court in the *Bradley* case, and is in conflict with the decisions of the courts of appeals in other circuits.²² Manifestly, it is important to the equitable and uniform adminis-

²¹For example, in *Barton v. United States District Court*, 19 F. 2d 722 (8th Cir.), the court found "abuse of discretion" in the three-year suspension of an attorney for the manufacture of beer in violation of the Volstead Act. See *Barnett v. Equitable Trust Co.*, 34 F. 2d 916, 920 (2d Cir.), wherein Judge Learned Hand wrote "... we think the allowance plainly too large. It is argued that we should not disturb it, unless there has been an abuse of discretion. Perhaps so, but that phrase means no more than that we will not intervene, so long as we think that the amount is within permissible limits; if our conviction is definite that it is [not], we cannot properly abdicate our judgment."

²²*Supra*, pp. 8, 13 and 14. The action of the court below is also at odds with the practice in most state courts. In a majority of states (approximately thirty) the first judicial consideration of disciplinary proceedings is by the highest court of the state, and that court is of course required to exercise its own discretion with respect to whether the facts warrant discipline, and, if so, the measure of

tration of the federal judicial system that the conflict be resolved and the governing principles clarified by this Court.

3. *Failure to Pass upon Suggestion of Rehearing en Banc.* The petition for rehearing filed with the court below (Tr. 300-320) embodied a suggestion that it be considered by the Court of Appeals *en banc* (Tr. 313-19), as is authorized by 28 U. S. C. 46(c). This Court has recently ruled that, whatever procedure is adopted by a court of appeals to exercise the statutory power to sit *en banc*, it must enable a litigant to address his suggestion "... to those judges who, under the procedure established by the court, have the responsibility of initiating a rehearing *en banc* ..." *Western Pacific Railroad Case*, 345 U. S. 247, 267-68.

The rules of the court below are silent on this question of procedure, and, as was set forth in the suggestion filed with the court below, the Clerk of that court was unable to advise counsel of any such procedure, or to state which

punishment which is required. See *e.g.*, *In re Scott*, 53 Ney. 24, 292 Pac. 291. And in those states where disciplinary proceedings are commenced in a lower court, the appellate courts have often extended the scope of their review far beyond the determination of "abuse of discretion". See, *e.g.*, *Hurst v. Bar Rules Committee*, 202 Ark. 1101, 155 S. W. 2d 697 (three-year suspension found to be more just than the permanent disbarment which had been ordered by the lower court); *Matter of Flournoy*, 142 Fla. 459, 195 So. 138 (period of suspension substantially reduced on appeal, on ground that period ordered by lower court was too severe); *In re Meldrum*, 243 Iowa 777, 51 N. W. 2d 881 (disciplinary proceedings reviewed "*de novo*" in the appellate court); *In re Emmons*, 316 Mich. 674, 26 N. W. 2d 560; *State Board of Examiners v. Brown*, 42 Wyo. 108, 290 Pac. 1013; *Campbell v. Third District Committee*, 179 Va. 244, 18 S. E. 2d 883. Even the few appellate courts that have paid lip-service to "abuse of discretion" as the standard of review have upon occasion accorded a far more comprehensive review than the phrase customarily encompasses. See, *e.g.*, *In re Conner*, 357 Mo. 270, 207 S. W. 2d 492; *Memphis & Shelby County Bar Association v. Aspero*, 35 Tenn. App 9, 242 S. W. 2d 319.

judges "have the responsibility of initiating a rehearing *en banc*" (Tr. 316). Absent any indication that the responsibility had been delegated by the full bench of active judges to a division or panel (*cf. Western Pacific Railroad Case, supra*, at pp. 259 and 272), the suggestion was addressed to the full bench (Tr. 318).

The petition for rehearing was acted upon and denied by the division of the court below that had already affirmed the order of permanent disbarment (Tr. 321-22). The suggestion of *en banc* consideration was either ignored or rejected *sub silentio*. Judge Clark's dissenting opinion states (Tr. 322):

"While I desire to record my view that appellant's points of law in criticism of the opinion of this court heretofore entered in this case are well taken and that the petition ought to be heard *en banc*, yet I shall not ask for a separate vote of all the judges on this petition. I do think we are not complying with the requirements for *en banc* hearings stated in *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U. S. 247; but the point is sufficiently made on the record for purposes of review, and a vote by only the three judges now active and available to participate would doubtless be no more convincing than decision by a minority of the court. The interest of expeditious review suggests that no further delay be had in this court. Judge Frank authorizes me to say that he concurs in my views that the issue ought to be heard *en banc*, but that no further steps should be taken here in view of the state of the record and we can properly await and hope for instructions by the Supreme Court as to the procedure we ought to follow."

In suggesting to the court below the desirability of *en banc* consideration of the case, petitioner drew attention

to the conflict of decisions within the Circuit,²² and the division of views among the judges (Tr. 314-15). See *Western Pacific Railroad Case*, *supra*, at 260 footnote 20, and 270. Petitioner's suggestion below also urged (Tr. 314) that "... the criteria to be applied in disbarment proceedings in the federal courts of this Circuit should, it is submitted, be authoritatively laid down by the Court of Appeals. This is especially desirable since this proceeding is not primarily an issue between litigants, but is a matter pertaining to the integrity of judicial proceedings and the character of the Bar within this Circuit." Petitioner also pointed to the practice in certain other courts, following Lord Mansfield's example, of considering disbarment proceedings *en banc*.²³

It is beyond argument that the Court of Appeals for the Second Circuit has not enabled litigants to address suggestions for *en banc* consideration to those judges who have the power to initiate such consideration. Indeed, it appears from Judge Clark's opinion that no procedure whatsoever for initiating an *en banc* hearing has been adopted.²⁴

²²*Supra*, pp. 9-10, 14 and 17.

²³In *Ex Parte Brounsall*, *supra*, after Lord Mansfield had been apprised of the nature of the attorney's misconduct, he observed (at p. 839): "But as it is for the dignity of the profession that a solemn opinion should be given, we will take an opportunity of mentioning it to all the judges." And then at a later date he announced the unanimous opinion of "all the judges", laying down the legal test described *supra*, p. 9. See *In re Noell*, 93 F. 2d 5, (where a disbarment proceeding was undertaken by the active judges of the Court of Appeals for the Eighth Circuit *en banc*); *Herts v. United States*, 18 F. 2d 52 (where the disbarment proceeding in the District Court for the District of Minnesota had been heard by the three judges of the District); *In re Chopak*, 66 F. Supp. 265, and *In re Schackne*, 5 F. Supp. 680 (disbarment proceedings heard *en banc* by the judges of the District Court for the Eastern District of New York).

²⁴For the practice in the Third and Ninth Circuits, respectively, see Judge Maris' article *Hearing and Rehearing Cases in Banc*, 14 F. R. D. 91, and the *per curiam* opinion of the Court of Appeals for the Ninth Circuit in the *Western Pacific Railroad Case*, filed June 12, 1953, not yet reported (Tr. 317-18).

As a result, petitioner was unable to address his suggestion in accordance with the ruling in the *Western Pacific Railroad Case*. Nor does it appear from the record that the suggestion has been considered on its merits by any of the judges of the court below other than Judge Frank and Judge Clark,²⁰ or that the suggestion has been acted or passed upon either by the active judges of the circuit, or by the division which affirmed the disbarment order, or in any other manner whatsoever.

The inaction of the court below is patently erroneous under the decision in the *Western Pacific Railroad Case*, and must be reversed. There is no need to stress the importance of bringing about conformity, among the courts of appeals of the several circuits, with the requirements this Court has so recently laid down for the implementation of the statute authorizing *en banc* proceedings.

CONCLUSION

In most of the cases that now come before this Court—involving as they do the interpretation of federal statutes, or the validity of federal or state action—the Court's range of decision is limited by such well-known principles as that the Court will not substitute its judgment for that of the legislature or a administrative body, whatever might be thought of the wisdom of the statute or action in question. But in this case the Court's proper function is not so con-

²⁰The fact that prior to decision a majority of the then active judges voted against *en banc* sitting (Tr. 284-85) is irrelevant to the present question. For it does not appear whether the negative votes were cast on the basis that this case did not warrant *en banc* consideration, or that Judge Clark was not authorized to initiate an *en banc* proceeding, or on some other basis altogether. The judges who voted in the negative may have considered themselves "powerless to act". See *Western Pacific Railroad Case*, *supra*, at 263. Furthermore, whatever the reason for this action, it did not satisfy the requirements laid down by this Court for the consideration and disposition of a suggestion from one of the litigants, nor could it dispose of the suggestion that a rehearing be granted and held *en banc*.

fined. Prescribing and preserving the standards of membership in the federal bar (at least where the state courts have not spoken) is the sole responsibility of the federal courts, and especially of this Court at the apex of the federal judicial system. The resolution of the policy issues posed by this case is, therefore, a matter for this Court's own untrammelled judgment.

Under these circumstances, counsel for the petitioner ventures to remind the Court, with the utmost respect, that the frequent unavailability of counsel to represent individuals accused of unlawful subversive activities or connections has increasingly aroused the manifest concern of bar associations and of leading jurists, including members of this Court. True, it does not excuse the petitioner's conduct that it arose out of current tensions in the course of a long and otherwise unspotted professional career. There is less than no reason to relax the standards of conduct in order to favor *any* attorney, whether or not his client's cause obliges him to swim against the tide.

Yet it cannot be gainsaid that the petitioner's conduct would not, by the standards that have customarily been applied by the courts in more serene times, warrant a sentence of professional death and irredeemable disgrace. And if this punishment of wholly exceptional severity is now allowed to stand, the consequence must be to magnify contemporary hazards to the integrity and dispassionateness of the American bar.

For all of the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

August 31, 1953.

TELFORD TAYLOR
New York, N. Y.

Counsel for Petitioner

APPENDIX

1. Rule 5 of the Rules of the District Court for the Southern District of New York reads, in relevant part, as follows:

"(b) The court shall make an order disbarring a member of the bar of this court (1) who has been convicted in any federal, state, or territorial court of an offense which is a felony in the jurisdiction of such conviction; or (2) who has been disbarred by any court of record, federal, state or territorial. The court may make an order disbarring a member of the bar who has resigned from the bar of any state, or of any such court. The court may make an order suspending a member of the bar of this court from practice until the expiration of the period for which he has been suspended by such other court.

"(c) Professional misconduct shall include fraud, deceit, malpractice or conduct prejudicial to the administration of justice, or a failure to abide by the provisions of the canons of ethics of the American Bar Association or of the New York State Bar Association.

"Complaints of professional misconduct shall be presented to the chief judge, and if he deems the charges of sufficient weight, he may refer them either to the United States Attorney for this district or to the grievance committee of a bar association in the county where the member resides or has his office. The United States Attorney or grievance committee shall thereupon conduct such preliminary investigation of the charges as may seem warranted and shall take appropriate action.

"(d) A disciplinary proceeding shall be commenced by filing a petition setting forth the charges against the respondent. A copy of the petition shall be served upon the respondent personally or by mail. The respondent shall serve his answer within 20 days thereafter. The chief judge may thereupon order the matter set for prompt hearing before a court of one or more judges, or may appoint a master to hear and report his findings and recommendations. If the court finds the respondent guilty of professional misconduct, it may disbar, suspend or reprimand him. The court, with the consent of the respondent, may order the hearing to be private, and direct the papers to be sealed."

2. In banc hearings and rehearings of the courts of appeals are authorized by 28 U. S. C. 46(c), which reads as follows:

"Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

3. Stipulation with respect to the record in the *Dennis*

case:

SUPREME COURT OF THE UNITED STATES

In the Matter
of

HAROLD SACHER, also known as "Harry
Sacher, and ABRAHAM J. ISSERMAN,
Attorneys.

HAROLD SACHER, also known as "Harry"
Sacher, an Attorney,

Petitioner,

and

ASSOCIATION OF THE BAR OF THE CITY
OF NEW YORK and NEW YORK COUNTY
LAWYERS' ASSOCIATION,

Respondents.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties to the above-entitled cause that:

For the purposes of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining the case on its merits, the printed record shall consist of the record printed and filed with the Clerk of the Supreme Court.

IT IS FURTHER STIPULATED AND AGREED that in addition to the printed record, the record herein shall include, and the parties may refer in brief and argument to, the record on appeal filed in the United States Court of Appeals for the Second Circuit in the case of *United States v. Den-*

nis, et al, on the appeal of the defendants in said case from the judgments of conviction rendered against them in the United States District Court for the Southern District of New York on October 21, 1949, which record on appeal was offered by petitioner herein and received as an exhibit in evidence on the trial of the above-entitled proceeding.

IT IS FURTHER STIPULATED AND AGREED that any of the parties may refer in their briefs and argument to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

Dated: New York, N. Y.
August 28, 1953.

/s/ TELFORD TAYLOR
Counsel for Petitioner

/s/ F. W. H. ADAMS
Counsel for Respondents

4. Order of Justice Jackson staying the mandate of the court below:

SUPREME COURT OF THE UNITED STATES

No. October Term, 1953.

HAROLD SACHER, also known as
"Harry" Sacher, an Attorney,
Petitioner,

vs.

ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK and NEW
YORK COUNTY LAWYERS' ASSO-
CIATION.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner and the statement of counsel for the respondents that he has no objection,

IT IS ORDERED that the mandate of the United States Court of Appeals for the Second Circuit be, and the same is hereby, stayed to and including September 2, 1953. Should a petition for certiorari be filed on or before that date then this stay is to continue pending the disposition of this petition for certiorari. In the event the petition is granted then this stay is to continue pending the issuance of the mandate of this Court.

S/ ROBERT H. JACKSON
Associate Justice of the Supreme
Court of the United States.

Dated this 18th
day of August, 1953.